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# MARKUP OF HOUSE RESOLUTION 461, IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

## COMMITTEE ON THE JUDICIARY
## HOUSE OF REPRESENTATIVES

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# MARKUP OF HOUSE RESOLUTION 461, IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

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THURSDAY, JUNE 26, 1986

House of Representatives,
Committee on the Judiciary,
*Washington, DC.*

The committee met, pursuant to call, at 9 a.m., in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. (chairman of the committee) presiding.

Present: Chairman Rodino, Representatives Brooks, Kastenmeier, Edwards, Conyers, Seiberling, Mazzoli, Hughes, Synar, Schroeder, Glickman, Frank, Crockett, Schumer, Morrison, Feighan, Smith, Boucher, Staggers, Bryant, Fish, Moorhead, Hyde, Kindness, Lungren, Sensenbrenner, McCollum, Shaw, Gekas, DeWine, Dannemeyer, Brown, Swindall, and Coble.

Staff present: M. Elaine Mielke, general counsel; Garner J. Cline, staff director; Richard L. Cates, special counsel; Alan F. Coffey, associate counsel; and Michael J. Remington, counsel, Subcommittee on Courts, Civil Liberties and the Administration of Justice.

The **Chairman**. The committee will come to order.

Mr. **Kastenmeier**. Mr. Chairman.

The **Chairman**. The gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, I make a point of order. A quorum is not present.

The **Chairman**. The clerk will call the roll.

Mr. **Cline**. Mr. Brooks.

[No response.]

Mr. **Cline**. Mr. Kastenmeier.

Mr. **Kastenmeier**. Here.

Mr. **Cline**. Mr. Edwards.

Mr. **Edwards**. Here.

Mr. **Cline**. Mr. Conyers.

[No response.]

Mr. **Cline**. Mr. Seiberling.

[No response.]

Mr. **Cline**. Mr. Mazzoli.

Mr. **Mazzoli**. Here.

Mr. **Cline**. Mr. Hughes.

Mr. **Hughes**. Here.

Mr. **Cline**. Mr. Synar.

[No response.]

Mr. **Cline**. Mrs. Schroeder.

Mrs. **Schroeder**. Here.

Mr. Cline. Mr. Glickman.

Mr. Glickman. Here.

Mr. Cline. Mr. Frank.

[No response.]

Mr. Cline. Mr. Crockett.

[No response.]

Mr. Cline. Mr. Schumer.

[No response.]

Mr. Cline. Mr. Morrison.

Mr. Morrison. Here.

Mr. Cline. Mr. Feighan.

[No response.]

Mr. Cline. Mr. Smith.

[No response.]

Mr. Cline. Mr. Berman.

[No response.]

Mr. Cline. Mr. Boucher.

[No response.]

Mr. Cline. Mr. Staggers.

Mr. Staggers. Here.

Mr. Cline. Mr. Bryant.

Mr. Bryant. Here.

Mr. Cline. Mr. Fish.

Mr. Fish. Here.

Mr. Cline. Mr. Moorhead.

Mr. Moorhead. Here.

Mr. Cline. Mr. Kindness.

[No response.]

Mr. Cline. Mr. Lungren.

[No response.]

Mr. Cline. Mr. Sensenbrenner.

[No response.]

Mr. Cline. Mr. McCollum.

Mr. McCollum. Here.

Mr. Cline. Mr. Shaw.

[No response.]

Mr. Cline. Mr. Gekas.

Mr. Gekas. Here.

Mr. Cline. Mr. DeWine.

Mr. DeWine. Here.

Mr. Cline. Mr. Dannemeyer.

[No response.]

Mr. Cline. Mr. Brown.

Mr. Brown. Here.

Mr. Cline. Mr. Swindall.

[No response.]

Mr. Cline. Mr. Coble.

Mr. Coble. Here.

Mr. Cline. Mr. Rodino.

The Chairman. Here.

And Mr. Sensenbrenner is present.

Mr. Cline. Mr. Chairman, 19 members are present.

The Chairman. A working quorum being present, I recognize the gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, I ask unanimous consent that the committee permit this meeting this morning to be covered in whole or in part by television broadcast, radio broadcast and/or still photography, pursuant to rule 5 of committee rules.

The **Chairman**. Without objection, it is so ordered.

The committee will proceed with House Resolution 461. The Chair would like to make a statement.

Today we consider a historic impeachment resolution. For the first time in history, we must consider whether a Federal judge convicted of a crime should be removed from office.

The American system of government rests on a bedrock principle—that ours is a government of laws, not men. In the United States, no one stands above the law, not even the judges who interpret the law for us.

This equality before the law guarantees the integrity of our system. It guarantees our rights and liberties. Only under a system of government where there is equality and justice under the law can we truly have a government of, by, and for the people.

A tremendous public trust is placed in a person who is appointed as a Federal judge. A judge must be a model of integrity to ensure fair application of the laws. A judge's actions—both on and off the bench—must instill public confidence in the judge's fairness and impartiality. The framers of the Constitution recognized this by providing life tenure during good behavior for Federal judges to insulate them from the effects of politics and other pressures.

Because of the tremendous responsibility placed upon Federal judges, they simply cannot act in a way that violates the public trust and undermines the integrity of the judicial office. Once public confidence in the courts erodes, our tripartite system of government fails.

Ours is a system where each branch of government acts as a check and balance against the other two branches. Just as the judicial branch acts as a check upon the activities of the Executive and Legislative Branches, impeachment serves as the ultimate check when an individual judge betrays the integrity of his office.

Impeachment is not a remedy used lightly. There are currently 749 Federal judgeships. In the past 200 years, thousands of individuals have served as life-tenured Federal judges. Only ten judges have been impeached throughout our history, demonstrating the serious and extreme nature of the impeachment remedy.

In the case before us, a judicial officer of the United States has been found guilty of not paying his taxes. He was tried by a jury of his peers. He has unsuccessfully appealed his conviction all the way to the Supreme Court. By not paying his taxes, he flaunted an obligation shared by all citizens of this nation. Congress has a clear duty to inquire into impeachment.

The Subcommittee on Courts, Civil Liberties, and the Administration of Justice under the able leadership of the gentleman from Wisconsin, Mr. Kastenmeier, along with the Ranking Minority Member, Mr. Moorhead, acted quickly on this matter and held a hearing one week ago. Judge Claiborne was invited to attend and testify at this hearing. He did so attend, but he declined to testify, allowing his attorney instead to make a statement to the subcommittee on his behalf.

The subcommittee permitted this statement to go beyond the limits of the subcommittee's inquiry in order to afford Judge Claiborne every possible due process right.

After hearing testimony by Judge Claiborne's attorney, by the Department of Justice, which prosecuted the case against the judge, and by Judge Wiggins of the Ninth Circuit Court of Appeals, the subcommittee adopted four articles of impeachment against Judge Claiborne. The committee will consider these articles this morning.

It is regrettable that this action is necessary, but a judicial officer of the United States, charged with upholding the law, has himself been found to have violated the law.

The Chairman recognizes the gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, the Subcommittee on Courts, Civil Liberties and the Administration of Justice reports favorably on the Resolution H. Res. 461 with five amendments and moves its recommendation to the full House.

The **Chairman**. The Clerk will read the resolution.

Mr. **Cline**. House Resolution 461. Resolution impeaching Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of high crimes and misdemeanors.

*Resolved,* That Harry E Claiborne, Judge of the United States District Court for the District of Nevada is impeached of high crimes and misdemeanors.

The **Chairman**. The Chair at this time will recognize for five minutes the gentleman from Wisconsin, Mr. Richard Cates, who has been retained as counsel by the Committee on Judiciary for the presentation of this matter.

Mr. Cates, will you proceed to present this to the committee.

Mr. **Cates**. Thank you.

Mr. Chairman, members, I have been asked to briefly outline the four articles that the subcommittee has voted on and sent here for consideration. The articles, all four, arise out of the fact that Judge Claiborne was convicted August 10, 1984 of violating two counts of income tax laws. In 1979 and 1980, he filed tax returns where he was found to have been untruthful. He, in essence, was found to have falsely filed his tax return for 1979 and for 1980. Article I alleges the fact that in 1980, when he filed his 1979 tax return, he did file it willfully and knowingly, knowing that it was false.

Article II describes the offense that occurred on or about June 15, 1981, when he subscribed and knowingly made a false return for 1980. Now, these facts that he did this were found by a jury of 12 persons.

They were found beyond a reasonable doubt. The inquiry staff and the subcommittee did not make an independent determination of the facts. The Articles I and II state the fact that he committed the crime and rely on the fact that a jury found him guilty and that is the essence of Articles I and II.

Article III is the article which identifies the fact that following the jury verdict he was convicted by the court and sentenced to prison, sentenced to two years on each count, and ordered to pay a $5,000 fine on each count. The sentences were to run concurrently.

Article IV is a count which again is tied to the misconduct that is alleged in counts one and two, tied to the fact that he was not truthful in the filing of his income tax return.

This alleges an additional concept. He is a United States district judge, and by doing this particular act, he has demeaned that office in a way that, in the opinion of the subcommittee, warranted a determination that he was guilty of misdemeanors and, therefore, in their opinion, should be impeached.

I think that about identifies these, sir.

The **Chairman**. Thank you very much, Mr. Cates.

The Chair consulted with both the chairman of the subcommittee and the ranking member as to a procedure under which the committee would consider this resolution. Without objection, there will be one hour of general debate on the resolution, equally divided between the chairman and the ranking member of the subcommittee. Debate on each article will be limited to 30 minutes, equally divided between the chairman and the ranking member of the subcommittee.

The time will be controlled by the chairman and the ranking member of the subcommittee. I recognize the gentleman from Wisconsin, Mr. Kastenmeier, and the gentleman from California, Mr. Moorhead, for 30 minutes each. They may yield the time to other members.

Mr. Kastenmeier.

Mr. **Kastenmeier**. Mr. Chairman, I thank you for your opening statement and for that procedural rule.

Mr. Chairman, I yield myself so much time as I may consume and I will be brief.

You, yourself, set forth the background of this historic event, an impeachment, and Mr. Cates set forth the facts, the basic facts and the theory under which the articles of impeachment were reached by the subcommittee.

I should note that 12 years ago at this very time in this room, Mr. Chairman, you and I and six other members who are currently members of this committee, sat on another impeachment. It was at the very conclusion, the denouement of the impeachment of Richard Nixon in the House of Representatives. That proceeded for many, many, many months, a long, drawn-out procedure. It was very painful for this country.

The reason I alluded to that event 12 years ago, Mr. Chairman, is not to idly refer to old times and history, but rather to suggest that in contrast, this proceeding is moving with great expedition. Indeed, I would like to recapitulate for the committee that which has happened.

On June 3rd, House Resolution 461 was introduced in the House by you, Mr. Chairman, and by six or seven other members of this committee, senior members of this committee. I must also give my friend from Wisconsin, my colleague on this committee, credit. Judge Harry E. Claiborne had exhausted his appeals in April of this year with the Supreme Court, his direct appeals, and on May 16 had been, indeed, not only convicted but committed to prison and began serving a sentence.

He did not, as others have in the past, resign. Indeed, he announced his intention not to resign so he left really very little option for this committee, other than to exercise its constitutional duties. Therefore, the resolution introduced on June 3, referred to this committee and then subsequently to the subcommittee I chair, was followed by an organizational meeting on June 11 and on Thursday of last week, June 19, by a full day's hearing on the matter, at which the Department of Justice testified at great length relating to the case itself, including, of course, the fact of conviction. We also heard from one of the former members of this committee who served during the impeachment process, who testified as a judge of the Circuit Court of Appeals, Judge Charles Wiggins. And we heard, or were to have heard, from the defendant, who was brought here to this room, but declined, in the afternoon session, to personally testify, although he was accorded that opportunity.

He was, however, represented by his attorney, a very able one, who had represented him in the case itself, and during various motions and appeals. The attorney, not wishing to be constrained by the scope of the case—we previously announced that we intended to limit the scope of the case literally to the facts of conviction and to the fact that the jury had found him guilty of lying about his income tax returns—was allowed to testify beyond that scope to satisfy all the elements of due process. Following that hearing, the subcommittee met last Tuesday and, after a lengthy session, reported out four articles of impeachment.

The first two articles were amended by amendment of the gentleman from Connecticut, Mr. Morrison, which made it more explicit that indeed these facts had been found by a jury. In other respects, however, the articles, as drafted and presented to the subcommittee on Tuesday, were approved and were forwarded to you and, Mr. Chairman, to this committee by a vote of 15 to nothing.

We will have an opportunity, as the chairman has pointed out, to debate each article. There perhaps will be one or two amendments that I am aware of that may be offered. There will be perhaps more lengthy discussion of Article IV and we can discuss at that time the theory of Article IV, as well as the rest of the articles. But it is time, Mr. Chairman, that we proceed.

We have the spectacle of a Federal judge sitting in prison, drawing a salary, not removed from office. Obviously the country expects fair but expeditious treatment of this matter, this very serious matter, by this committee. Mr. Chairman, we ought to move forward. I reserve the balance of my time.

[The statement of Mr. Kastenmeier follows:]

### Opening Remarks of Hon. Robert W. Kastenmeier

Impeachment is the constitutional remedy for serious offenses against this Nation's system of government by high-ranking public officials. Fortunately, we do not often have to use the remedy. Occasionally, we have to exercise our constitutional responsibilities.

The Committee on the Judiciary is facing an unprecedented set of facts: the subject of these proceedings is a high ranking public official who has already been convicted of two counts of filing false income tax returns by a jury of twelve citizens and incarcerated in a federal prison in Montgomery, Alabama. Judge Harry E. Claiborne is the first federal judge in the history of this country to be convicted of criminal conduct and sent to jail while sitting on the bench.

On Thursday of last week, the subcommittee held a hearing in executive session during which we examined the conduct of Judge Claiborne. The subcommittee previously had decided to restrict its inquiry to an analysis of the two counts of falsifying his federal income tax returns for which he was convicted and to an assessment of whether his conviction (and subsequent incarceration) constitute behavior incompatible with the duties and responsibilities of a federal judicial officer.

The session was well-attended not only by subcommittee Members but also by several full Committee Members. The subcommittee heard from the U.S. Department of Justice, which presented information about the trial and conviction of Judge Claiborne. Judge Charles Wiggins testified that the jury verdict against Judge Claiborne could create a collateral estoppel situation in a later Senate trial, meaning that the defense could later be barred from disputing the truth of facts determined by twelve unanimous jurors.

Judge Claiborne's attorney, Oscar Goodman, indicated to the subcommittee during the noon break that he would not present a defense unless he was allowed to explore matters beyond the scope of the conviction and its compatibility with the duties and responsibilities of a federal judicial officer. The subcommittee agreed to allow Mr Goodman to present arguments outside of this narrow scope.

Mr. Goodman, a capable advocate, ultimately discussed the entire chain of events that preceded Judge Claiborne's first trial (which ended in a hung jury). Mr. Goodman also apprised the subcommittee of a recently filed motion to vacate the judgment and sentence of Judge Claiborne because his conviction was allegedly obtained in violation of the Fifth Amendment. This collateral relief motion alleges that Federal agents engaged in a pre-indictment burglary of Judge Claiborne's home, photographed the contents of the judge's personal financial diary, later used the diary to prepare for trial, and thus obtained his conviction in an unconstitutional way.

Mr. Goodman did use a portion of his time to rationalize Judge Claiborne's behavior. But in the judgment of the subcommittee, Mr. Goodman's arguments, even when considered in their best light, could not adequately explain the conduct.

Even assuming, for purposes of argument, that the collateral relief motion is successful, and the conviction is overturned, the facts relating to Judge Claiborne's behavior cannot be reversed. The conduct remains the same.

It should also be observed that after previously accepting the opportunity to appear, Judge Claiborne elected to return to Maxwell Air Force Base where he is serving his prison sentence. Judge Claiborne made no oral remarks to the subcommittee and, indeed, left early.

On Tuesday of this week, my subcommittee met to consider articles of impeachment. I presented four articles to the Members. The four articles were discussed and debated. Two clarifying amendments were adopted, one amendment to Article I and one to Article II. The four articles, considered together, were reported favorably by the subcommittee by a unanimous 15 to 0 vote.

I am not unalterably wed to the specific drafting of all four articles and I have worked with several Members to clarify legislative language. I, however, strongly feel that the basic thrust of each of the four articles is sound, and I will continue to support all four.

Let me now briefly describe the four articles. Each article indicates that Judge Harry E. Claiborne, a district judge for the District of Nevada, has engaged in high crimes or misdemeanors, which warrant his removal from office. The articles are not redundant or duplicitous.

The first article is a fact count, alleging that Judge Claiborne willingly and knowingly falsified his federal income tax form for the calendar year 1979.

The second article—also a fact count—alleges that Judge Claiborne willingly and knowingly falsified his federal income tax form for the calendar year 1980.

The third article is a conviction count, alleging that on August 10, 1984, Judge Claiborne was found guilty without dissent by a twelve person jury of his peers of making and filing false federal income tax forms for the calendar years 1979 and 1980, in violation of title 26, United States Code, section 7206(1). His conviction, standing alone, should be sufficient to sustain an impeachment resolution.

The fourth, and final, article states that Judge Claiborne's actions have brought disrepute on the Federal judiciary. It alleges that Judge Claiborne—having taken an oath of office to discharge and perform all the duties incumbent on him and to enforce and obey the Constitution and laws of the United States and being required to uphold the integrity and independence of the judiciary—brought disrepute on the federal courts and the administration of justice. He did this when he misbehaved in his capacity as a federal judge by willfully falsifying his income on both his 1979 and 1980 federal income tax returns.

Judge Claiborne has engaged in misbehavior and should be impeached.

The **Chairman**. The Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice has consumed six minutes of the time.

The Chair will recognize the gentleman from California, Mr. Moorhead.

Mr. **Moorhead**. Thank you, Mr. Chairman.

I yield two minutes to the Ranking Member of the full committee, the Honorable Hamilton Fish of New York.

The **Chairman**. The gentleman from New York, Mr. Fish.

Mr. **Fish**. I thank my colleague and thank you, Mr. Chairman.

As an ex officio member of all our subcommittees, I participated in the panel's consideration and at this time would like to congratulate the Chairman and Ranking Member of the Subcommittee on Courts and Civil Liberties for the very able, fair, expeditious and yet deliberate way that this matter has been handled.

Mr. Chairman, the amendments to H. Res. 461 that you and I introduced, approved by the Courts Subcommittee, propose four articles of impeachment. I find myself largely in agreement with their factual approach and legal soundness. All four of the articles are intentionally drafted in a fact specific manner.

Proposed Article I is based upon the fact that in 1979, Judge Harry Claiborne knowingly signed a personal tax return he knew to be false. Correspondingly, Article II states the fact that Judge Claiborne did the same with respect to his 1980 tax return. Article III is a recognition of the fact that Judge Claiborne was found guilty by a jury of both of the above counts on August 10, 1984.

Finally, Article IV states in part that by failing to obey the laws of the United States, Harry E. Claiborne has failed to properly discharge his duties and obligations as Federal judge.

In doing so, he has harmed the integrity and public confidence in the Judicial Branch.

Mr. Chairman, I do not believe in this case the committee needs to make an independent finding of fact. Rather, our action is analogous to the concept of judicial notice, but in a legislative setting. The committee has before it the trial transcript, the exhibits introduced in evidence at the trial, the various motions made and appeals that have been taken in this case.

They are a matter of public record. An impartial jury in Nevada listened to the same evidence, evaluated it, and found beyond a reasonable doubt that conviction was justified.

Later in this proceeding, Mr. Chairman, I intend to support the amendment sponsored by the gentleman from Ohio, Mr. DeWine, to Article IV. He makes the point, and I think it is a good one, that the current language on the judicial oath in Article IV could present us with additional and unnecessary evidentiary problems in the Senate. I think he is correct and his amendment should be adopted. As you said, this is not a pleasant task for this committee, but it is a constitutional responsibility and obligation which must not be evaded.

We are faced with plain, indisputable facts and they justify the impeachment of Judge Claiborne.

The **Chairman**. Before the Chair recognizes the gentleman from California again, the Chair would like to state that each member is entitled to request his statement be inserted in the record since this record will be printed. I think it is important it be a printed record because of the nature of the resolution that we are considering. While members may not avail themselves of time to speak on this matter, nonetheless, they may want to insert their written statement into the record.

The Chair will recognize them for this purpose through the same procedure.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I would like to commend our subcommittee chairman for his leadership in this difficult matter and to also commend you for your swiftness and fairness in considering H. Res. 461. I would also like to give special credit to Jim Sensenbrenner, the honorable gentleman from Wisconsin, for his insistence that we act with due diligence on this particular matter. No one takes any pleasure in what we are doing here, but we have a constitutional obligation to act and to act quickly.

In America, the stability of our courts and our government rests upon the approval of the people. To work at all, our system of dispensing justice must have absolute integrity administered with absolute impartiality. A judge should always avoid infractions of the law. His personal behavior, both on and off the bench, should be beyond reproach.

A judge convicted of a crime while in office destroys the confidence of the people in our system of justice. We have before us the clear and lengthy record of a conviction of a Federal judge by a unanimous vote of a 12-person jury. He was convicted during his second trial of willfully and unlawfully failing to report approximately $108,000 in legal fees on his 1979 and 1980 Federal income tax returns. He has exhausted his appeals and he continues to refuse to resign his position as he sits in a Federal jail in Montgomery, Alabama, and draws his monthly Federal paycheck. We have before us this morning four articles of impeachment.

These articles have been carefully drafted. Our purpose was to keep the case against Judge Claiborne tight, but at the same time, protect the necessary options of the House to try the case if need be, in the Senate. I would ask the members, as they are reviewing these articles, to keep in mind that this case will have to be tried. We must keep it as tight as we can and not open it to anything except the facts of the second trial, the facts that resulted in a verdict of guilty, the conviction itself, and the disrepute brought on the Federal judiciary by this particular man.

Mr. Chairman, I urge a favorable vote on all four articles and that we continue to move swiftly and take this matter to the floor of the House, and then to the Senate as soon as possible.

The CHAIRMAN. The gentleman has consumed three minutes.

The gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I yield three minutes to the gentleman from Kentucky, Mr. Mazzoli.

The CHAIRMAN. The gentleman from Kentucky is recognized for three minutes.

Mr. MAZZOLI. Thank you very much, Mr. Chairman.

Let me start my brief remarks by saluting the Chairman of our subcommittee, the gentleman from Wisconsin, on an excellent job, presiding very fairly over a very difficult subject area. Let me say that I think we have a very simple case here and I hope we don't overly complicate it during the course of the debate today.

To review the facts simply, we have an individual, a Federal judge, who was indicted by a grand jury, convicted by a jury of his peers. He appealed the convictions to the U.S. Circuit Court for the Ninth Circuit. Those appeals were rejected.

He continued through very able counsel to take a writ of certiorari to the Supreme Court and his petition was denied. The District Court for the District of Nevada where the case was heard, upon the rejection of the writ of certiorari—sent this judge to jail. He is now serving his time in the slammer in Alabama where he continues in outrageously contemptuous conduct to draw his salary. He has not done judicial duty since 1983 and he continues to draw the salary, continues to draw it while he is, as I said, in the slammer.

This, to me, constitutes on its face very clear, without all of the legalistic folderol, unacceptable judicial conduct. It constitutes, in my judgment, not serving in good behavior, which is a requirement in the Constitution for the continued service on the bench of Federal judges. It constitutes a clear public scandal. It constitutes a betrayal of the public trust. Further, his refusal to do the seemly and decorous thing of resigning from his office, constitutes, in my judgment, arrogance.

It is high-handed. It is contemptuous of the public trust. It is unseemly behavior, crass and greedy. It is unbecoming of an officer of the court and certainly unbecoming of a public servant.

I just think on its face, very clearly, Judge Claiborne does not deserve to sit as a Federal judge. Judge Claiborne should be impeached and he should be removed from office.

The Chairman. The gentleman has consumed two minutes.

The gentleman from California, Mr. Moorhead.

Mr. Moorhead. I yield two minutes to the gentleman from Ohio.

The Chairman. The gentleman from Ohio is recognized for two minutes.

Mr. Kindness. I thank the Chairman and I thank the gentleman from California for yielding this time.

I, too, would commend my Chairman of the subcommittee and the Ranking Minority member, as well as the gentleman from Wisconsin, Mr. Sensenbrenner, for the way in which the matter has been moved along expeditiously, fairly and I think with the openness that is appropriate following the closed session when testimony was taken.

I think it has been handled with the appropriate dignity. I would like to address my principal remarks to Article IV of the articles of impeachment in order to differentiate between the approaches to that article which will be discussed here today.

Some of us believe that Article IV ought not to be included in the articles of impeachment. The other three articles deal with factual circumstances that are relatively clear and easy to prove in the trial of the impeachment in the United States Senate.

Article IV, on the other hand, involves several questions, one of which will be addressed by an amendment to be proposed by the gentleman from Ohio, Mr. DeWine, which was presented in the subcommittee as well, and that would remove the question of an oath of office taken by Judge Claiborne and breached according to the terms of Article IV.

If you take that out, there is really nothing left of Article IV anyway, but we must concentrate our attention on the fact that the oath of office taken by a Federal judge is a different oath than the oath taken by other constitutional officers of the United States, including Members of Congress, in which we swear to uphold and obey the Constitution and laws of the United States. It just happens that that is not the wording of the oath taken by judges, which is instead directed to their administering justice fairly and appropriately, in accordance with the Constitution and the laws of the United States. That is a different matter. It isn't involved in the breaches of Judge Claiborne. I urge that when the appropriate time comes, you consider voting to eliminate Article IV altogether. I will support the amendment of the gentleman from Ohio, Mr. DeWine, to modify it, but I believe there is nothing left when that occurs.

The CHAIRMAN. The gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I yield three minutes to the gentleman from New Jersey, Mr. Hughes.

The CHAIRMAN. The gentleman from New Jersey is recognized for three minutes.

Mr. HUGHES. Thank you very much, Mr. Chairman.

I want to echo the sentiments of my colleagues in congratulating the chairman of the subcommittee, Mr. Kastenmeier, and the ranking minority member, Mr. Moorhead, and the members of the committee for their very professional and expeditious handling of the Claiborne matter.

Mr. Chairman, much has already been said about the Articles of Impeachment and we will have an opportunity to debate, as the proceedings unravel this morning, the specifics of Article IV in particular.

Suffice to say, I join with my colleague from Kentucky in my hope that we keep it rather simple. It seems to me that the clear case is one for impeachment on the basis of filing false income tax returns for tax years 1979 and 1980.

Mr. Claiborne was convicted by a jury of his peers after having been indicted by a grand jury on those offenses. The jury had under consideration a full day of the judge's explanation of the information contained in those returns and the jury found against him.

He pursued his appeals, as is his right, through the process to the Supreme Court. Presently he attacks the convictions collaterally. So the judge has had his day in court.

He has brought disrespect to the court, to the laws that he is charged to uphold. There is no question but that Judge Claiborne is guilty of an impeachable offense and I intend to so vote.

It is my hope, however, that we don't include Article IV, not because it is not merited—because I believe it is. I think we could very well conclude that Judge Claiborne has, in fact, committed four impeachable offenses charged in the four Articles. That is not the point. I just hope that we keep the focus on the fact that this judge has been convicted by a jury and not get off on tangents and discussions and debates as to whether or not we are redundant in

Article IV. That is the only reason why I have some concern about including Article IV.

I intend to keep an open mind on that issue, but I have some concern that as this debate moves forward in the House and to the Senate, if, in fact, the House votes impeachment, we get off on a major tangent as to whether or not there is redundancy built into the Articles of Impeachment.

I learned many, many years ago when I handled grand jury matters for some ten years that where in fact you have tight cases, all you do by including everything but the kitchen sink of built-in redundancy is just encourage a great deal of argument and you lose the major focus of the indictment.

I would just hope my colleagues would keep that in mind as we debate the four articles.

I yield back the balance of my time.

The **Chairman**. The time of the gentleman has expired.

The gentleman from California.

Mr. **Moorhead**. Yes, Mr. Chairman. I yield two minutes to the gentleman from California, Mr. Lungren.

The **Chairman**. The gentleman from California, Mr. Lungren, is recognized for two minutes.

Mr. **Lungren**. Thank you very much, Mr. Chairman.

I would just say that it is obvious, I think, about what must be done here. The people are outraged, frankly that a Federal judge, having been convicted under our system of justice, sits in Federal prison and yet at the same time refuses to give up his judgeship, courtroom, et cetera.

Because judges have life-time tenure, the only way we can remove them is by impeachment.

It seems to me when one has gone through the legal process, as Judge Claiborne has done, and you have had a jury verdict, you have had the attempt at appeals that were unsuccessful, you have gone all the way to the United States Supreme Court, for us not to act is to suggest that somehow our judicial system is not worth anything.

A judge should not be above the law. For us not to move on impeachment would suggest that the decisions made by jurors in a jury, the decision made by the appellate court upon review, are of not that much importance for us to consider.

It seems to me we are left to do nothing else but to pass on the impeachment to the Senate. I do not want to suggest for one moment that the Congress is limited to impeaching a Federal judge to a finding by a jury of a criminal conviction.

Nonetheless, when we have a situation in which a judge has been found guilty by the judicial system, it seems to me that that really closes the issue. It is a fairly simple proposition. If we reviewed it to see that, in fact, the judge was convicted, that all procedures were followed appropriately, then it seems to me we have no other course of action to take but to report the Articles of Impeachment, present this to the Senate, and have the Senate go forward with the action necessary.

I think this is something that is probably as important as any single thing a member of Congress can do. It goes to the integrity of the system. It goes to the integrity of our process, and I want to applaud the actions of all of those who have brought us to this point.

We need to act quickly. We need to make sure that this matter is closed as quickly as possible, and I think it is fairly clear as to what direction we should take.

The **Chairman**. The gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, I would like to yield three minutes to the gentlewoman from Colorado, Mrs. Schroeder.

The **Chairman**. The gentlewoman from Colorado is recognized for three minutes.

Mrs. **Schroeder**. Thank you, Mr. Chairman.

I want to underline several points.

It's no secret judges are not very popular in our society, but they are especially not popular if they are sitting in jail and still drawing their salary.

Nevertheless, I want to compliment the subcommittee chairman, Mr. Kastenmeier, because he did not allow this committee to become tarnished by stampeding out and saying that we are going to condemn this judge without hearing exactly what had happened. We judged him objectively rather than trying to get political points.

So I want to compliment him and I want to compliment the chairman for insisting that we go through that procedure.

I also want to point out that what we are doing today is very important. Chiseled on so many buildings in this great capital are the words, "We are a government of laws and not of men."

That means everybody obeys the law. This committee has said that the President of the United States must obey the law, and today we are saying judges must obey the law.

Let's point out what the judge did. In 1979, he forgot to report almost $19,000 worth of income and he topped that in 1980 by forgetting about $88,000 worth of income.

I think a lot of Americans would like to forget to report their income, but that is really very shocking that you would have someone in that high-ranking position doing that.

Now, we looked carefully at the trial and what did we find? We found indeed Judge Claiborne did receive a fair trial. He was fully and adequately represented.

Seven days were spent on the trial itself and one day in deliberation. The judge was represented by three attorneys. Two were tax attorneys and one had specialized in criminal defense work for 18 years. We also found the judge had been on the witness stand for a full day presenting his case.

The jury still found he was guilty.

I think it is very important that record be cut there. We are not just doing something that is popular—we are following the law. He has had a full and adequate chance at each place to present his case. I think it is very clear that we must now move to impeachment and get on with trying to bring dignity back to the bench that he sits on.

Thank you very much.

The **Chairman**. The gentleman from California.

Mr. **Moorhead**. I yield four mintues to the gentleman from Wisconsin.

The CHAIRMAN. The gentleman from Wisconsin is recognized for four minutes.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

There is a plaque on President Reagan's desk that reads, "There is no limit to what a man can do or where he can go if he doesn't mind who gets the credit."

I guess the subcommittee in committee proceedings thus far proved that point.

I do want to publicly thank Chairman Rodino and my colleague from Wisconsin, Mr. Kastenmeier, for dealing with this matter expeditiously and judiciously, because rather than bring a privileged resolution from the floor that would have passed by a divided vote and jeopardizing our case in the Senate, I think the way this matter is being handled will result in a near unanimous if not a unanimous vote of impeachment by the House of Representatives and, thus, give us a very strong shot at getting a conviction and removal of this convicted felon from office in the United States Senate.

I particularly want to thank Mr. Kastenmeier for allowing this non-member of his subcommittee to come and participate in the closed inquiry that was held last week.

What we have here today is a judge who has been convicted of lying, in filing a false tax return for two years, who has taken appeals to the Ninth Circuit and the United States Supreme Court and has lost them all and is now sitting in prison drawing a salary from the taxpayers of this country of $215 a day.

This is scandalous and that is outrageous.

I publicly requested Judge Claiborne to resign when he went to prison. He has refused to do so, so the only way we can get him out of office is through the process of impeachment.

It is an extraordinary remedy. It is something that has not been used often in the history of our country, but if there ever is a case that warrants impeachment, this case is it.

At the trial, Judge Claiborne did not controvert the fact that the money that he received as income was not reported on his tax returns, but he seemed to allege that misconduct by the Justice Department and the FBI entrapped him into doing this.

The conduct of persons other than Judge Claiborne is not in issue in an impeachment inquiry and an impeachment trial. What we are talking about here today is whether Judge Claiborne's conduct merits impeachment and the record adequately supports that.

The second allegation was that this prosecution and conviction, apparently was something that was cooked up by the evil folks in Washington to get the crusading judge.

I would remind my colleagues on the committee that it was a Nevada jury that unanimously adjudged him guilty. Twelve Nevadans, one of whom could have voted against conviction and would have prevented that conviction from happening, but failed to do so.

Judge Claiborne has violated his oath of office. He has violated his public trust and he must be impeached and removed.

Thank you.

The CHAIRMAN. The gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, I yield three minutes to the gentleman from Kansas, Mr. Glickman.

The CHAIRMAN. The gentleman from Kansas is recognized for three minutes.

Mr. GLICKMAN. Mr. Chairman, this is a historic event, but it points to the incredible beauty of our country's form of government because this impeachment-related activity clearly focuses attention on the fundamental nature of separation of powers in this country.

While no one branch is in control of this government, if there is a slightly supreme branch in my mind, it is the Legislative Branch, because we alone have the power to remove Executive and Judicial Branch people.

Of course, the people have the ultimate power because they can remove us, but it does indicate that in matters of this kind of gravity, the Constitution, the framers of this country, gave us legislators, House Members to start the impeachment process, Senators to convict in that process, the ultimate power.

Secondly, I would say the Judicial Branch is not and should not be immune from scrutiny. People who don't pay income taxes, who file false tax returns, are not fit to be Federal judges. That is the subject of the matter before us today, impeachment of one of those officials, but I would say as a slightly general matter that judges generally, while intended by the framers of this country to be more separate from the people than the Executive and Legislative Branches, should take note that they should not be immune from the scrutiny of exhibiting proper conduct in government.

And third involves the precedence of what we are doing. Impeachments are very rare, but they do provide a constitutional escape valve for misconduct of high government officials. Viewed from a historical perspective, what we do here today not only sets a record for this proceeding in the House and in the Senate, but for future actions involving impeachments, whether for Federal judges or for Presidents of the United States.

The CHAIRMAN. The gentleman from California.

Mr. MOORHEAD. I yield two minutes to the gentleman from Florida, Mr. Shaw.

The CHAIRMAN. The gentleman from Florida is recognized for two minutes.

Mr. SHAW. Thank you, Mr. Chairman.

I thank the gentleman from California for yielding to me. There is no question that this is of historic significance. But I think that the most amazing thing of all is that we are here, hearing this case at this time, because Judge Claiborne has subjected the Congress to this duty. But most of all, that he has subjected his high office to this type of proceeding.

The facts are open and closed. There are no issues to be decided. I would hope that we would act expeditiously, the Senate would act expeditiously, and this matter will be put to rest as quickly as possible.

The disgrace that Judge Claiborne has brought to his high office is regrettable. I hope, and I still would hope, that Judge Claiborne would change his mind, that he would resign and save the Senate from having to go ahead with the duty of completing what this committee is going to do today.

Thank you, Mr. Chairman.

I yield back.

The **Chairman**. The gentleman from Wisconsin has 13 minutes remaining and the gentleman from California has 15 minutes remaining.

I recognize the gentleman from California.

Mr. **Moorhead**. Mr. Chairman, I yield two minutes to the gentleman from Pennsylvania, Mr. Gekas.

The **Chairman**. The gentleman from Pennsylvania is recognized for two minutes.

Mr. **Gekas**. Thank you, Mr. Chairman.

I appreciate the fact that the Chairman and the Ranking Member on the Courts Subcommittee have granted us this time.

To judge a judge or not to judge a judge, that is the question that comes before us.

If we will not judge the judge, who will?

The conviction that occurred in the lower court was one rendered by citizens against a fellow citizen who violated the law. We here today, now, are going to be determining how to judge that individual as a public official who was convicted at the hands of his peers. That is a little bit of a distinction which we must keep in mind.

It is not enough to allow the procedure against this individual to end with a conviction at the lower court. What that conviction denoted was that someone took the stand and defended his own case in a case which previously proved that he had lied.

The truth was violated in the lower proceeding, and we cannot avoid the consequences of that set of circumstances when it applies to a public official especially a Federal judge.

We, in attempting to do our duty here, have to preserve the integrity of the courts and I, just as everyone else on this committee, although acting reluctantly, will act with dispatch to vote, I am sure, in favor of this resolution.

I yield back the balance of my time.

The **Chairman**. The gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, I yield three minutes to the distinguished gentleman from Massachusetts, Mr. Frank.

The **Chairman**. The gentleman from Massachusetts is recognized for three minutes.

Mr. **Frank**. Thank you, Mr. Chairman.

I think it is a mark of leadership to be able to bring a diverse, somewhat strongminded group to perform an unpleasant task with dignity and dispatch.

The gentleman from Wisconsin has done that and we are all indebted to him and to the spirit of bipartisanship that persuaded the deliberations.

I simply want to give my reasons. I do so because inevitably, being lawyers charged with a very heavy responsibility, we are all being extremely careful to do it as each of us thinks is the correct way to do it.

Inevitably, some disagreement over tertiary detail will take up much of our deliberation today. I think that is appropriate, because we have the serious responsibility that must be discharged to suit each of our own vehicles in Congress.

I just want to do what I can to make sure that that inevitable difference over what I consider to be tertiary detail does not obscure the, I think, unanimous feeling on this committee on the facts and how we ought to operate. I think there is unanimity that impeachment is commanded by the facts of this case because we have a sitting Federal judge who committed crimes.

The evidence is overwhelming he did in fact commit these crimes and he is, therefore, unfit to serve on the bench.

I hope that that central core will be remembered as people also focus on the differences we have in the way in which we should present an impeachment based on that central set of facts.

I would just make two other points that reflect my own view because people will be looking for this record for precedents. There are two other issues that seem to me relevant.

First of all, it is the relationship of the underlying facts of the case, the undoubted evasion of taxes by this judge, of failure to report more than half of his income over two years, and the conviction.

To me the convictions are not independent grounds, but they are overwhelming evidence that the facts are as they are. That is, I would say that anyone convicted coming before us has an overwhelmingly heavy burden of proof, not an impossible one.

I don't believe it is an automatic situation, but it is a very heavy burden of proof to overturn those convictions.

Judge Claiborne, through his counsel, didn't begin to do that.

Secondly, we have the issue that was raised by the gentleman from Wisconsin, among others, that somehow an improper set of behavior on the part of the prosecution should save the judge from impeachment.

I don't for a minute concede that there was improper behavior. I don't think that case was proven at all, but that is not an issue before us.

The exclusionary rule might operate in a given case—and I don't mean to say it is this one—to keep someone out of prison, but I would hope we would remember there is a somewhat higher standard between staying out of prison and staying on the Federal bench.

Even if someone was in a similar situation in an exclusionary rule case that might justify an appeal being granted of the conviction, the underlying facts are still before us and they would justify the impeachment in this case.

On those two grounds, that the conviction is overwhelming but not automatic evidence that the facts are as they were presented, and that the exclusionary rule argument doesn't operate to save somebody from impeachment, I would like to make it clear that is my position on those two points.

Mr. **Edwards** [presiding]. The gentleman from California.

Mr. **Moorhead**. I yield two minutes to the gentleman from Ohio, Mr. DeWine.

Mr. **DeWine**. I would like to first congratulate Chairman Rodino and Subcommittee Chairman Kastenmeier for moving this so expeditiously, but also doing a thorough job of protecting the rights of everyone concerned.

The real question, Mr. Chairman, is what in the world do you do with a Federal judge who has been convicted of two major felonies, sentenced to the penitentiary, exhausted all his direct appeals, and yet who sits in that Federal penitentiary and refuses to resign and continues to draw pay from the public?

The answer may be an unpleasant one, but I think in essence really is a very simple one. We go ahead and do our duty and impeach him. There is no other remedy.

There is no other way to stop him from drawing his pay. There is no other way to stop this public scandal. We are fortunate in this case. We are not faced with a problem that this committee and this Congress has many times been faced in our 200-year history; that is, what exactly does constitute a high crime and misdemeanor?

Due to the facts of the given case, even though they might not be a serious crime or may not be a crime at all, are they sufficient for the House to return a conviction of impeach?

We don't have to consider that today. The four articles that are going to be presented today, I think, have been presented very clearly, and I will vote in favor of all four.

The first two deal with the underlying facts behind the convictions, or two of them do, basic facts. They establish whether or not the conviction stands or not. The other one deals with the fact that two convictions have been returned by a jury. Direct appeals have been exhausted. The fourth, the one I think we are going to have the controversy about, really deals with the question of whether or not this judge has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the Judiciary. I think clearly he has.

I will offer an amendment that I hope will be accepted, that I hope will maybe streamline that particular article. It is based upon a suggestion that I made at subcommittee, but it is also based upon some of the wording that my friend from Kentucky added when he was talking about it at the subcommittee state as well.

So I think that although this task may not be the most pleasant task, I think the facts are clear, and our duty is obvious. Thank you.

Mr. EDWARDS. The time of the gentleman has expired. The gentleman from California.

Mr. MOORHEAD. I yield two minutes to the gentleman from Florida, Mr. McCollum.

Mr. MCCOLLUM. Thank you very much, Mr. Moorhead.

We are certainly at a historic point today, and I think that has been made very clear. But in relationship to history, I think the key that we are here to discuss and to decide today is the fate of one individual and his career on the bench; the question of the integrity of our judicial system; and whether or not when a person has been convicted of the kind of crime that this individual has been convicted of, that it is unsuitable and improper for that person to continue to serve on the bench.

It seems to me that is unquestionably clear from the straightforward nature of the procedures that have gone forward in the courts up to this time, with all of the appellate issues being exhausted except for collateral attack. It seems to me finality has to be there at some point, and in the case of Judge Claiborne, that finality has come to pass from a judicial sense, and we, in turn, need to take the final steps, and since he has not resigned from the bench, pass these articles of impeachment.

Obviously, we do have a difference of opinion among some of the members of this committee over exactly what form each and every article will take. I think, from my perspective, that since I have not sat through the subcommittee proceedings most of what I will do today is to absorb some of the comments that are made and form my own opinions with respect particularly to Article IV, which seems to be the only one of any real controversy. I don't doubt for a minute that Judge Claiborne needs to be removed from the bench, unfortunately, and I am prepared to vote the articles accordingly.

As we go through this, I would note that the last time a judge was impeached, that judge came from my state. I don't think that is a proud moment for anybody or any state or any individual, and I take this as a very serious matter, and I do not take my duties lightly.

Thank you very much, Mr. Moorhead. Thank you very much, Mr. Chairman.

Mr. **Edwards**. The gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, I yield three minutes to the gentleman from Connecticut, Mr. Morrison.

Mr. **Morrison**. Thank you. I thank the gentleman for yielding, and I would like to join my colleagues in thanking the chairman of our subcommittee, the gentleman from Wisconsin, Mr. Kastenmeier, for the very, very professional and judicious way in which this matter has been handled. Despite the speed with which we have moved, I think we can all be proud of the process.

I certainly am persuaded beyond doubt that action to impeach this judge is appropriate. It is absolutely necessary that we send a message to the American people that the Congress does not tolerate felons sitting on the bench.

We also need to make clear to the judges who may, unfortunately, from time to time be convicted of a crime, that such conduct is not going to pass muster here, that they should not put the Congress through the process of impeachment, that they should have the good taste and good sense to resign.

That not being the case in this matter, we must move ahead. I think the disagreements on this committee about particular articles are questions of strategy, not of substance. I think we are all going to find ourselves in general agreement that the actions for which Judge Claiborne was convicted, tax exasion and false statement, are actions which meet the standard of high crimes and misdemeanors, and that, therefore, he should be impeached.

Articles I and II rely on that fact, and say further that the facts found by the jury beyond a reasonable doubt by a unanimous verdict are sufficient to meet the burden of proof for impeachment and conviction in the Senate.

For that reason, I will definitely support Articles I and II. Article III goes further and says that the conviction by the court upon that finding of the jury also, in and of itself, is sufficient, the conviction having been upheld on appeal, and in no way having been vitiated or challenged on any grounds that we find persuasive.

Finally, there is the question of Article IV. In my opinion, Article IV, while it would be sufficient and could be sufficient and was sufficient in other impeachments, is not necessary in this case, because Articles I, II and III are overwhelmingly demonstrated, supported and do the job. This is not the case in which we have to tell the public or the Judiciary that conduct of a lesser severity than conviction of a crime may lead to impeachment. This is the case in which we must say clearly that being convicted of a crime, in and of itself, will lead to conviction if the underlying offense meets the high crimes and misdemeanor standard.

I would hope we would stick to those three direct and clear articles and send that message in a clean, clear way over to the Senate, and, hopefully with a conviction, out to the people.

Mr. **Edwards**. The gentleman from California.

Mr. **Moorhead**. I yield two minutes to the gentleman, Mr. Dannemeyer.

Mr. **Dannemeyer**. Thank you for the time.

Scripture teaches us before you take the splinter out of your brother's eye, you take the log out of your own. I think what Judge Claiborne did was wrong. He should stand trial in the Senate on that charge. I intend to vote for the conviction, or at least for the indictment.

But we should also understand that there is a larger issue involved in this whole matter, and that is we, in the Congress of the United States, are also going to come under close scrutiny because we are the ones who establish the taxing and spending policies for the country. Our whole system of taxation is built on voluntary compliance, and when one of our citizens, who happens to be a judge of a Federal Court, a very high office, believes in his mind that the taxes that this country says you have to pay are so high that he will cheat on his taxes, it says something about the integrity of the judge, but it perhaps is saying something about the level of taxes that we, in our wisdom, are levying on the American people.

Maybe, just maybe, we, Members of Congress, are levying too many taxes on the people of this nation. Maybe we are spending too much of the people's money. We all know we are. We are creating debt for unborn generations that we don't have the courage to vote the taxes to pay for today, because we are fearful that if we voted those taxes, we would have many more Judge Claibornes around this country.

We, the Congress, are on trial, and I am glad to see at this time that a major tax revision proposal is coming out of the United States Senate that significantly drops marginal tax rates. I only hope those of us in Congress will have the courage to also restrain run-away spending today that literally, as we all know, is out of control.

Mr. **Edwards**. The gentleman from California.

Mr. **Moorhead**. I yield two minutes to the gentleman from Georgia, Mr. Swindall.

Mr. **Swindall**. Mr. Chairman, because in our history we have never before had a constitutional officer guilty of a conviction who has refused to resign from office voluntarily, whatever decision we make here this morning will be precedents for future such cases.

Regrettably, I suspect we will have future cases. It is, therefore, important that whatever we do today, we establish a clear and correct precedent. It is important, therefore, that if we are to maintain the integrity of our judicial system, but more importantly, our constitutional form of government, that we send a clear message that any constitutional officer, whether it be the President of the United States, the Vice President of the United States, a Member of the United States Senate, a Member of the United States House of Representatives, or a Member of our Judicial System, if any of those individuals are convicted of a crime, necessarily what will follow will be that individual's impeachment, conviction and removal from office. To do less than that would jeopardize the future of this constitutional republic.

Thank you.

Mr. **Edwards**. The gentleman from California.

Mr. **Moorhead**. Mr. Chairman, I yield two minutes to the gentleman from North Carolina, Mr. Coble.

Mr. **Coble**. Thank you, Mr. Moorhead.

Our chairman previously said today it is regrettable that this action is necessary, but necessary it is. Sailors, when speaking of navigational dangers, refer and relate to rocks and shoals. Judge Claiborne has placed himself on a course closely surrounded by rocks and shoals, it seems to me, and if we fail to take action, we may pursue that same course.

A public office of trust has been violated, and the one who violated it must answer for his conduct. Fair play and common sense, if nothing else, Mr. Chairman, dictate that a Federal Judge, who has been accused, prosecuted and convicted for felonious conduct, must be removed from office.

I opposed Article IV in subcommittee for reasons previously discussed. I do not oppose impeachment. It is the appropriate remedy to be applied in this matter.

I thank the chairman.

Mr. **Edwards**. The gentleman from California.

Mr. **Moorhead**. Mr. Chairman, I yield back the balance of my time.

Mr. **Edwards**. The gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, unless you have any request for time.

Mr. **Edwards**. I thank the chairman and I join my colleagues in complimenting the chairman and the ranking minority member of the subcommittee on a job well done. There is one aspect of the case that hasn't been mentioned today, and I think that the record ought to be complete. In the final appeal to the Ninth Circuit Court, before, of course, the final appeal to the Supreme Court of the United States, three judges dissented from the findings, dissented from the conviction of Judge Claiborne on various grounds.

One of the dissenting judges stated that in his opinion, "The proceedings thus far afforded Judge Claiborne fall far short of meeting the appearance of justice standard". Another indicated that the government failed to provide Judge Claiborne with evidence in its files reflecting on the credibility of the government's key witness. I am sure that will be looked at by our colleagues in the other body.

The key witness for the prosecution was the accountant for Judge Claiborne, and he apparently had made statements to the prosecution that were not revealed to the defense until after the trial was over.

The third judge said that there were "a number of serious questions calling for reconsideration".

As I said, I am going to vote for this impeachment because I think the evidence is very strong that Judge Claiborne should be tried in the Senate; however, I am going to ask unanimous consent that the opinions of the three judges of the Ninth Circuit who dissented—Circuit Judge Ferguson, Circuit Judge Reinhardt, and Circuit Judge Pregerson—be made at this point a part of the record.

Mr. MORRISON. Mr. Chairman, reserve the right to object.

Mr. EDWARDS. I yield.

Mr. MORRISON. I reserve the right to object, but I will not object, to inquire, whether it is the chairman's understanding the opinion of the court is already a part of the record, or if not, whether the gentleman would include the opinion of the court from which those are a dissent?

Mr. EDWARDS. I would ask the staff, is this matter I am presenting already a part of this hearing record?

Mr. REMINGTON. Yes, it is.

Mr. EDWARDS. When was it put in?

Mr. REMINGTON. At the subcommittee level.

Mr. EDWARDS. Then it is not a part of this particular hearing record.

Mr. REMINGTON. No, it is not.

Mr. MORRISON. Further reserving my right to object, I don't think the gentleman answered my question. Is there an opinion of the court from which these dissenting opinions are recorded? I am just concerned that the record include——

Mr. EDWARDS. Then I would revise my unanimous consent request and ask for the full opinion of the court, including the three dissents, to be made a part of this hearing record.

Mr. MORRISON. I withdraw my reservation.

Mr. EDWARDS. Without objection, so ordered.

[The information follows:]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HARRY E. CLAIBORNE, DEFENDANT-APPELLANT

No. 84-1294

United States Court of Appeals, Ninth Circuit

Argued and Submitted March 26, 1985

Decided July 8, 1985

Defendant was convicted in the United States District Court for the District of Nevada, Walter E. Hoffman, Senior District Judge, of willfully underreporting taxable income, and he appealed. The Court of Appeals, Pell, Senior Circuit Judge, sitting by designation, held that: (1) defendant, a federal district judge, could be prosecuted without prior impeachment by Congress; (2) indictment was not subject to dismissal on ground that perjured testimony was presented to grand jury where there was no evidence beyond mere speculation to support that assertion; (3) disclosure of tax returns was proper; (4) presentation of same or similar evidence to three grand juries did not constitute abuse of grand jury process; (5) employment of IRS and FBI agents by grand jury did not justify dismissal of indictment; (6) evidence was sufficient to support conviction; (7) trial court did not abuse its discretion in failing to excuse two jurors for cause; (8) summaries of interviews with defendant's accountant were not statements subject to disclosure under the Jencks Act; (9) failure to disclosure impeachment evidence contained in those summaries did not justify new trial; and (10) trial court did not abuse its discretion in sequestering defendant's secretary during recess in the middle of her testimony.

Affirmed.

**1. Criminal Law 🔑878(4)**

Jury's acquittal of defendant on charge that defendant, a federal district court judge, falsely reported his finances to Judicial Ethics Committee was not inconsistent with their verdict convicting him of filing false information in income tax return. 18 U.S.C.A. § 1001; 26 U.S.C.A. § 7206(1).

**2. Judges 🔑38**

Federal district court judge could be prosecuted for willfully underreporting his taxable income even though he had not been impeached by Congress. U.S.C.A. Const. Art. 1, § 1 et seq.; Art. 3, § 1 et seq.

**3. Grand Jury 🔑2**

Grand jury guaranty was included in Bill of Rights to protect wrongfully accused defendants against mistaken and vindictive prosecutions. U.S.C.A. Const. Amend. 5.

**4. Grand Jury 🔑1**

Grand jury serves important investigative functions in addition to serving as shield against unwarranted prosecution.

**5. Indictment and Information 🔑144.1(1)**

Defendants may overcome presumption of regularity which attaches to grand jury proceedings and obtain dismissal of indictments returned against them on proper showing of grand jury abuse and defendants may establish such abuse by demonstrating that prosecutor obtained indictment by knowingly submitting perjured testimony to grand jury.

**6. Constitutional Law 🔑265**

**Grand Jury 🔑34**

Prosecutor's conduct in knowingly submitting perjured testimony to grand jury is arbitrary and capricious, violates due process, and must be condemned in exercise of court's supervisory powers. U.S.C.A. Const. Amend. 5.

**7. Indictment and Information 🔑144.1(1), 144.2**

Perjury before grand jury must be material to justify dismissal of indictment and courts should not presume that perjured testimony was material.

**8. Indictment and Information 🔑144.1(1)**

If sufficient nonperjurious testimony exists to support indictment, courts will not dismiss indictment due to presence of perjured testimony before grand jury.

**9. Indictment and Information 🔑144.2**

Grand jury indictment of federal district court judge on charges of willfully underreporting his taxable income and submitting false statement to Judicial Ethics Committee would not be dismissed on ground that prosecution knowingly presented perjurious testimony to grand jury where there was no showing beyond mere speculation that perjured testimony was presented to grand jury or that Government had any reason to believe that witness' testimony was perjured.

**10. Indictment and Information 🔑10.1(4)**

Agreement, under which witness agreed to testify truthfully before all grand and petit juries investigating or trying charges against defendant and government agreed to recommend reduction in witness' previously imposed sentences for tax fraud, was not fundamentally unfair where agreement did not make any benefit to witness contingent on defendant's indictment or conviction and thus agreement did not present invitation to perjury.

**11. Criminal Law 🔑996(3)**

Defendant lacked standing to contest reduction of sentence of witness who had made agreement with prosecution to testify truthfully before all grand and petit juries investigating or trying defendant in exchange for Government's recommendation for reduction in witness' previously imposed sentences for tax fraud.

**12. Grand Jury ⚷33**

Speculation cannot justify court's intervention into grand jury's proceedings.

**13. Indictment and Information ⚷144.1(1)**

Even if witness had perjured himself when testifying before grand jury, allegedly perjured testimony would not justify dismissal of indictment against defendant where alleged perjury pertained to counts in indictment which had been dismissed before trial and thus was not material to defendant's indictment on the other counts.

**14. Internal Revenue ⚷4482**

Disclosure of defendant's tax returns to Department of Justice for use in bribery case against defendant was proper. 26 U.S.C.A. § 6103(a, h, i).

**15. Criminal Law ⚷394.2(1)**

Suppression of defendant's tax return for improper disclosure to federal officers is inappropriate remedy even in cases of plain error. 26 U.S.C.A. § 6103(a, h, i).

**16. Grand Jury ⚷36.8**

Prosecution's presentation of same or similar evidence to successive grand juries impaneled in Oregon and to another grand jury impaneled in Nevada which returned indictment against defendant did not constitute abuse of grand jury process since adverse action or failure to act by previous grand jury does not limit or exhaust successor grand jury's power to investigate.

**17. Indictment and Information ⚷144.1(1)**

Even if Government's presentation of evidence to three grand juries could be considered to have violated principle underlying policy forbidding successive state and federal prosecutions for same crime, such violation did not compel dismissal of indictment.

**18. Indictment and Information ⚷144.1(2)**

Employment of IRS agent and four FBI agents as grand jury agents did not mandate dismissal of indictment where only one agent revealed his future status as grand jury agent to only one recipient of grand jury subpoena, no agent sought to immunize testimony of grand jury witnesses from future prosecution, and there was no indication that the agents were misusing their access to grand jury materials for civil enforcement purposes.

**19. Grand Jury ⚷41.50(3)**

Disclosure of grand jury materials to IRS and FBI agents who assisted prosecution in collecting evidence for grand jury was proper and did not require court order where there was no indication that agents sought access to the materials for purely civil purposes. Fed.Rules Cr.Proc.Rule 6(e)(3)(A)(ii), (e)(3)(C), 18 U.S.C.A.

**20. Internal Revenue ⚷5263**

Proof of willfulness is essential to support conviction for willfully underreporting taxable income. 26 U.S.C.A. § 7206(1).

**21. Internal Revenue ⚷5263**

To prove willfulness in prosecution for willfully underreporting taxable income, government must show that defendant intended to violate the law or knew that his actions would do so. 26 U.S.C.A. § 7206(1).

**22. Internal Revenue ⚷5263**

Neither careless disregard whether one's actions violate law nor gross negligence in signing tax return will suffice to prove willfulness in prosecution for willfully underreporting taxable income. 26 U.S.C.A. § 7206(1).

**23. Internal Revenue ⚷5302**

In prosecution for willfully underreporting taxable income, government may base its proof of willfulness on circumstantial evidence indicating that defendant knew or must have known that his returns were false. 26 U.S.C.A. § 7206(1).

**24. Internal Revenue ⚷5263**

In prosecution for willfully underreporting taxable income, defendant may rebut Government's proof of willfulness by establishing good faith reliance on qualified accountant after full disclosure of tax-related information but cannot shift his responsibility for deficiencies to accountant if he has withheld vital information or has taken steps to mislead his accountant. 26 U.S.C.A. § 7206(1).

**25. Internal Revenue 🔑5302**

In prosecution for willfully underreporting taxable income in 1979, evidence that defendant's accountant denied receiving letter in which defendant allegedly made full disclosure of his income to accountant supported jury's rejection of defendant's reliance defense. 26 U.S.C.A. § 7206(1).

**26. Internal Revenue 🔑5302**

Evidence was sufficient to support conviction for willfully underreporting taxable income for 1979. 26 U.S.C.A. § 7206(1).

**27. Internal Revenue 🔑5302**

In prosecution for willfully reporting taxable income in 1980, evidence that defendant had practiced law for 30 years and had served three years on federal bench during which he presided over some tax law disputes supported jury's rejection of defendant's claim of ignorance of tax issues. 26 U.S.C.A. § 7206(1).

**28. Criminal Law 🔑1144.13(5)**

In reviewing jury's decision to convict, Court of Appeals must draw all reasonable inferences from evidence in favor of government. 26 U.S.C.A. § 7206(1).

**29. Jury 🔑33(5.1)**

It is constitutionally impermissible to force defendants to exhaust their peremptory challenges to jurors on persons who should be excused for cause. U.S.C.A. Const.Amend. 6.

**30. Jury 🔑33(5.1)**

Even though forcing defendant to expend peremptory strikes may implicate Sixth Amendment, constitutional problem only arises in cases where prospective juror upon whom defendant spent peremptory challenge was actually biased and therefore should have been excluded by trial judge. U.S.C.A. Const.Amend. 6

**31. Jury 🔑103(6)**

In prosecution for willfully underreporting taxable income, district court did not commit manifest error or abuse discretion in failing to excuse for cause two prospective jurors against whom defendant expended two peremptory challenges where, even though jurors indicated that they had preconception of guilt or innocence, both indicated that they would decide guilt or innocence impartially on evidence presented at trial. 26 U.S.C.A. § 7206(1).

**32. Criminal Law 🔑627.7(3)**

Summaries of interviews conducted by government agents with witness were not statements subject to disclosure under the Jencks Act [18 U.S.C.A. § 3500] where witness did not draft the summaries or otherwise approve their contents.

**33. Criminal Law 🔑627.7(3)**

Summaries of interviews conducted by government agents with witness were not statements subject to disclosure under the Jencks Act [18 U.S.C.A. § 3500] where summaries did not purport to transcribe in substantially verbatim fashion witness' interviews but represented agents' selection of certain information conveyed by witness for possible use in the case and where summaries were not drafted contemporaneously with witness' responses.

**34. Criminal Law 🔑1166(10.10)**

Even if district court's refusal to disclose summaries of interviews conducted by government agents with defendant's accountant to defendant being prosecuted for willfully underreporting taxable income was clearly erroneous or abuse of discretion, decision did not prejudicially affect defendant's substantial rights where only information contained in summaries that could be damaging to accountant's credibility was his admission that he lost or mislaid some records during his move to new office but record demonstrated that defendant did cross-examine accountant with respect to this loss of records. 18 U.S.C.A. § 3500.

**35. Criminal Law 🔑1166(10.10)**

In prosecution for willfully underreporting taxable income, prosecution's failure to deliver government summaries of interviews with defendant's accountant pursuant to defendant's general request for exculpatory information did not justify new trial where disclosure of the summaries would not have created any reasonable doubt, in that defendant already had access to most damaging impeachment evidence contained in the summaries, and same result would have been obtained even if request had been specific.

**36. Criminal Law 🔑665(1)**

In prosecution for willfully underreporting taxable income, trial court did not abuse its discretion by sequestering defendant's secretary during brief recess in middle of her testimony where sequestration was apparently ordered to prevent improper influences upon her testimony.

Steven A. Shaw, Jan Nielsen Little, Public Integrity Section, Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Oscar B. Goodman, Goodman, Terry, Stein & Quintana, Las Vegas, Nev., J. Richard Johnston, Oakland, Cal., William Raggio, Reno, Nev., for defendant-appellant.

Appeal from the United States District Court for the District of Nevada.

Before PELL, LUMBARD, and McWILLIAMS, Senior Circuit Judges.*

PELL, Senior Circuit Judge.

A jury sitting in Reno, Nevada, convicted defendant Harry E. Claiborne on two counts charging that defendant willfully underreported his taxable income on his 1979 and 1980 tax returns. 26 U.S.C. § 7206(1) (1967). The jury acquitted defendant of one count charging that he submitted a false statement to the Judicial Ethics Committee. 18 U.S.C. § 1001 (1976). The district court sentenced defendant to a term of two years imprisonment plus a $5,000 fine on each tax count. Defendant appeals from the judgment of conviction on the two income tax counts.

## I. THE FACTS

Defendant, who continues to hold office as a United States district judge, became a district judge for the District of Nevada on September 1, 1978. Prior to that time, defendant was engaged in a lucrative private practice in Las Vegas, Nevada, and had had an income of six figures annually. Upon entering the judiciary, defendant's annual salary was $58,000. In a 1980 letter requesting payment of legal fees he had earned before becoming a judge, defendant stated that he was in desperate financial straits. Approximately two years later, a federal grand jury in Portland, Oregon, began investigating allegations that defendant had accepted bribes from a Joseph Conforte in the performance of his official duties. Two subsequent grand juries, one again in Portland, Oregon, and one in Reno, Nevada, investigated these charges as well as allegations that defendant had understated his income in his 1979 and 1980 tax returns and had filed a false financial statement with the Judicial Ethics Committee. The term of the first Portland grand jury expired and the second grand jury there was not asked to return an indictment. The Reno grand jury, however, returned a seven count indictment against defendant, containing four charges relating to defendant's alleged bribery activities with Joseph Conforte, the two tax counts, and one count charging that defendant falsely reported his finances to the Judicial Ethics Committee.

Joseph Conforte appeared as a witness before the indicting grand jury. In exchange for Conforte's testimony, and his agreement to cooperate fully in further investigations of defendant and in his prosecution, the Government agreed to recommend a substantial reduction in sentences that Conforte had previously received for tax evasion. Subsequently, a federal judge ordered reduction of Conforte's sentences.

Defendant moved to dismiss the indictment returned against him on various grounds, all of which the district court rejected. The case then proceeded to trial. The district court ultimately declared a mistrial after the jury reported that it was hopelessly deadlocked.

[1] At this point, the Government voluntarily moved to dismiss the four Conforte bribery counts, stating in part: "The attorneys further believe that in the first trial of this case the presentation of evidence on Counts One, Two, Three and Four may have distracted the jury in its consideration of Counts Five, Six, and Seven and contributed to its inability to reach a verdict on those counts." Record at 204. Defendant then renewed all previous pretrial motions relating to the remaining three counts, all of which the district court denied, in some instances after a hearing. The case subsequently proceeded to trial for a second time, on the two tax counts and the count relating to the Judicial Ethics Committee. As we have noted, the jury con-

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*Wilbur F. Pell, Jr., Senior Circuit Judge for the Seventh Circuit, J. Edward Lumbard, Senior Circuit Judge for the Second Circuit, and Robert H. McWilliams, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

victed defendant on the two tax counts, but acquitted him on the count relating to the Ethics Committee.[1] Defendant challenges his conviction on a number of grounds, which we shall discuss in turn.

## II. DEFENDANT'S CONTENTIONS

### *A. Judicial Immunity from Prosecution*

[2] Defendant's first contention deserves minimal attention from this court. Defendant contends that Articles I and III of the United States Constitution, as well as the doctrine of separation of powers, prohibit the prosecution of a federal judge without prior impeachment by Congress. The parties concede that no impeachment proceedings have been brought against defendant. Defendant filed a pretrial motion covering these contentions, which the district court denied. This Court upheld the district court's denial of defendant's motion. *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 113, 83 L.Ed.2d 56.

In upholding the denial of defendant's motion, this court relied on two cases which dismissed similar claims. *United States v. Claiborne*, 727 F.2d at 845, *citing United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982) *cert. denied*, 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) (per curiam), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146. These cases squarely held that the Constitution does not immunize a federal judge from criminal prosecution prior to impeachment. *United States v. Hastings*, 681 F.2d at 710-11; *United States v. Isaacs*, 493 F.2d at 1144. In view of the reasoning in *Hastings* and *Isaacs*, and in view of our previous opinion, in this case, squarely deciding this issue adversely to defendant, we see no reason to re-examine the question here.

We remark, in addition, that defendant's suggestion that the protections guaranteed by the Constitution to criminal defendants are inadequate to protect a federal district judge appears disingenuous from our review of the record, which appears to us to reflect that defendant was afforded a fair trial fully consistent with the protection of his constitutional rights.

### *B. Intrusions into the Grand Jury's Independence*

Defendant's second contention, in which he seeks dismissal of his indictment, subsumes numerous challenges relating to the manner in which the prosecution obtained the indictment. These challenges, unlike defendant's first contention, merit some discussion from this court.

#### *1. The Conforte testimony and its effect on the grand jury*

Defendant contends that the prosecution knowingly presented the perjurious testimony of Joseph Conforte to the indicting grand jury, and that this testimony unconstitutionally biased the grand jury against him. Defendant maintains that the prosecution intentionally failed, in examining Conforte, to require Conforte to specify the exact dates on which incidents culminating in the alleged acts of bribery occurred, because the prosecution allegedly knew that the acts did not take place. Defendant additionally maintains that the prosecution amended its request for notice of defendant's intent to rely on an alibi defense three times before trial, each time changing the dates on which the alleged acts of bribery took place, because Conforte kept changing the details of his story. These acts, defendant asserts, amounted to the knowing presentation of perjured testimony, or at least an invitation to Conforte to perjure himself before the grand jury. Defendant asserts that Conforte's perjurious testimony irreparably biased the grand jury against him, in violation of the Due Process Clause of the Fifth Amendment. Alternatively, defendant asserts that the prosecution's behavior in obtaining and presenting the Conforte testimony justifies a dismissal of defendant's indictment in the exercise of this court's supervisory power.

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[1] The defendant points out in his brief that the jury acquitted him on Count VII, The Judicial Ethics Committee count, but convicted him on the two tax counts, which likewise involved the reporting of income. The defendant does not directly challenge these verdicts as being inconsistent. To the extent he indirectly does so, we do not regard them as inconsistent. Count VII related to a requirement that federal judges disclose certain information about their property and income in an annual report. The jury may well have regarded violation of this requirement as an entirely different crime from filing false information in an income tax return, because the latter involves a failure to pay money due the Government and acutely concerns the public interest.

[3, 4] We begin our analysis by examining the Fifth Amendment's grand jury guarantee in federal felony trials. That guarantee ensures that, except in certain military cases, "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. Federal courts agree that the framers of the Bill of Rights included the grand jury guarantee in the Fifth Amendment to protect wrongfully accused defendants against mistaken and vindictive prosecutions. *See United States v. Dionisio,* 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973); Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (1980). Federal courts also agree, however, that the grand jury serves important investigative functions in addition to serving as a shield against unwarranted prosecution. *United States v. Calandra,* 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). As the Supreme Court observed in *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (citations omitted):

> It is a grand inquest, a body of powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. . . .

*Id.* at 688, 92 S.Ct. at 2660.

> When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed. Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. It is only after the grand jury has examined the evidence that a determination of whether the procedures will result in an indictment can be made.

*Id.* at 701-02, 92 S.Ct. at 2667 (citations omitted).

In view of the grand jury's broad investigatory powers, and in view of the grand jury's duty not to determine guilt or innocence but to determine whether probable cause exists to believe that a crime has been committed, *United States v. Calandra,* 414 U.S. at 349, 94 S.Ct. at 620, the courts have sharply limited a defendant's ability to challenge the nature of evidence presented to a grand jury. *See Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (holding that a grand jury witness may not refuse to answer questions on the ground that the questions were based on evidence derived from an unlawful search and seizure); *Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956) (barring a challenge based on the exclusive use of hearsay before a grand jury); *Lawn v. United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958) (prohibiting a challenge to subpoenaed evidence based on defendant's privilege against self-incrimination). In so doing, the courts have recognized that such evidentiary challenges are best resolved in the adversary arena of a criminal trial. *United States v. Short,* 671 F.2d 178, 183 (6th Cir.1982), *cert. denied,* 457 U.S. 1119, 102 S.Ct. 2932, 73 L.Ed.2d 1332. In order to ensure that trials and not pretrial inquiries into the grand jury process resolve such challenges, the courts have attached a presumption of regularity to grand jury proceedings. *See United States v. Woods,* 544 F.2d 242, 250 (6th Cir.1976), *cert. denied,* 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977); *Beverly v. United States,* 468 F.2d 732, 743 (5th Cir.1972).

[5, 6] Notwithstanding these limitations on a defendant's ability to challenge the evidence presented to a grand jury, the cases do recognize that defendants may overcome the presumption of regularity which attaches to grand jury proceedings and obtain dismissal of indictments returned against them on a proper showing of grand jury abuse. *United States v. Samango,* 607 F.2d 877, 881 (9th Cir.1979). Defendants may establish such grand jury abuse by demonstrating that the prosecutor obtained an indictment by knowingly submitting perjured testimony to the grand jury. *United States v. Thompson,* 576 F.2d 784, 786 (9th Cir.1978), *United States v. Kennedy,* 564 F.2d 1329, 1338 (9th Cir.1977), *cert. denied,* 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978). The courts reason that such conduct is arbitrary and capricious and therefore violates due process or that such conduct must be condemned in the exercise of the courts' supervisory powers. *United States v. Al Mudarris,* 695 F.2d 1182, 1185 (9th Cir.1983), *cert denied,* 461 U.S. 932, 103 S.Ct. 2097, 77 L.Ed.2d 305. Indeed, a decision of this court requires a prosecutor who discovers perjury by a grand jury witness after indictment to inform the defendant, the trial court, and the

grand jury of the perjury so that the grand jury may reconsider its decision to indict. *United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir.1974).

[7, 8] The cases agree, however, that perjury before a grand jury must be material to justify dismissal of the indictment. *United States v. Bracy*, 566 F.2d 649, 655 (9th Cir.1977) *cert. denied*, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978); *United States v. Bowers*, 534 F.2d 186, 193 (9th Cir.1976) (per curiam), *cert denied*, 429 U.S. 942, 97 S.Ct. 360, 50 L.Ed.2d 311; *Coppedge v. United States*, 311 F.2d 128, 132 (D.C.Cir.1962). Moreover, courts should not presume that perjured testimony was material. *United States v. Kaplan*, 554 F.2d 958 (9th Cir.1977) (per curiam), *cert denied*, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315. As a consequence, if sufficient non-perjurious testimony exists to support the indictment, the courts will not dismiss the indictment due to the presence of perjured testimony before the grand jury, on the assumption that the grand jury would have returned an indictment without the perjurious evidence. *Coppedge v. United States*, 311 F.2d at 131-32. In a similar vein, other courts confronted with evidence of perjured testimony before a grand jury presume that no prejudice thereby resulted to defendant and therefore refuse to dismiss the grand jury's indictment. *United States v. Adamo*, 742 F.2d 927, 941 (6th Cir.1984).

[9-12] In the case before us, defendant contends that the perjurious testimony of Joseph Conforte before the grand jury did result in actual prejudice because the grand jury would not have returned an indictment without it. There is no evidence to support these assertions. The defendant has made no showing, beyond mere speculation, that Conforte gave perjured testimony before the grand jury or at the first trial. Nor has he made any showing that the Government had any reason to believe that Conforte's testimony was perjured.[2] Speculation cannot justify this court's intervention into the grand jury's proceedings. *See United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.1977) (discussing separation of powers reasons for court's refusal to intervene in grand jury proceedings), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83. Under these circumstances, the Government's presentation of Conforte's testimony to the grand jury was not the sort of flagrant misconduct required to justify dismissal of the indictment under the Due Process Clause or our supervisory powers. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391-92 (9th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1441, 79 L.Ed.2d 762 (1984).

[13] Moreover, even if Conforte perjured himself before the grand jury, we note that Conforte's testimony related only to Counts I through IV of the indictment, and that the Government moved to dismiss these "Conforte" counts before proceeding to trial (for the second time) against defendant. Thus, any perjury committed by Conforte before the grand jury was not *material* to defendant's indictment on Counts V through VII and necessarily was not material to defendant's conviction on Counts V and VI. *See United States v. Bracy*, 566 F.2d 649, 656 (9th Cir.1977) (defining material perjury as evidence that creates a reasonable doubt with respect to defendant's guilt that did not otherwise exist), *cert. denied*, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978). *See also Laughlin v. United States*, 385 F.2d 287, 291 (D.C.Cir.1967) (examining taint solely with respect to the charges of which defendant was convicted), *cert. denied*, 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103 (1968). Indeed, Conforte did not appear as a witness at defendant's second trial. Under these circumstances, this court perceives no prejudice resulting from the presentation of Conforte's testimony to the grand jury. In any event, there can be no claim, and there is no claim, that there was insufficient nonperjured evidence to justify the indictment of the defendant on the tax counts and the ethics count. *See Talamante v. Romero*, 620 F.2d 784, 791 (10th Cir.1980) (finding it unlikely the grand jury would have declined to indict defendant in view of the petit jury's finding of guilt after a full trial), *cert. denied*, 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99. As a result, we find that the trial judge committed no abuse of discretion in refusing to dismiss defendant's indictment due

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[2] We note that defendant also raises objections to the manner in which the Government procured Conforte's testimony. Specifically, defendant contends that the Government's deal with Conforte, under which Conforte agreed to testify truthfully before all grand and petit juries and the Government agreed to recommend a reduction in Conforte's previously imposed sentences for tax fraud, among other offenses, was fundamentally unfair. We disagree, and observe that the agreement did not make any or all benefits to Conforte contingent on defendant's indictment or conviction. *See United States v. Dailey*, 759 F.2d 192, 197 (1st Cir.1985). Thus, the agreement did not present an invitation to perjury. *Id.* We note, in addition, that the district court correctly determined that defendant lacked standing to contest the reduction of Conforte's sentence. Finally, we note that defendant misinterprets this court's construction of the 120-day period set forth in Rule 35(b) of Federal Rules of Criminal Procedure. Contrary to defendant's assertion, this court allows reduction of sentence within a reasonable time following the expiration of 120 days. *United States v. Smith*, 650 F.2d 206 (9th Cir.1981).

to presentation of perjury before the grand jury. *United States v. Noti*, 731 F.2d 610, 613 (9th Cir.1984).

*2. Obtaining access to defendant's tax returns for use in a non-tax case*

Next, defendant challenges the manner in which the prosecution obtained access to defendant's tax returns. Defendant asserts that the prosecution obtained access to the returns in violation of 26 U.S.C. §6103(a), because the prosecution sought the returns for use in a judicial proceeding relating to tax administration while claiming to seek the returns for use in a non-tax case. Defendant asserts that the procedures required for disclosure in tax-related cases are more stringent than those required for disclosure in non-tax cases. Specifically, defendant contends that Internal Revenue Service guidelines require routine procedures including audits and conferences between Internal Revenue Service and Department of Justice officials before transfer of a case from the Internal Revenue Service to the Department of Justice. Defendant contends that these routine steps were not taken here and that, therefore, the prosecution should not have submitted the returns to the grand jury.

We disagree. First, although 26 U.S.C. §6103(a) protects an individual's privacy interest in his or her tax returns and tax return information, subsections (h) and (i) of that section permit disclosure of tax returns to federal officers and employees in both tax and non-tax cases. 26 U.S.C. §6103(a), (i) (1985 Supp.); 26 U.S.C. §6103(h) (1980). Contrary to defendant's assertions, these subsections prescribe more severe procedures for access to tax returns in non-tax cases than in tax cases. *Id. See also United States v. Mangan*, 575 F.2d 32, 38 (2d Cir.1978), *cert. denied*, 439 U.S. 931, 99 S.Ct. 320, 58 L.Ed.2d 324.

[14, 15] In this case, the district court granted disclosure of defendant's tax returns to the Department of Justice pursuant to 26 U.S.C. §6103(i) for use in the prosecution's bribery case against defendant. 26 U.S.C. §6103(i) (1985 Supp.). We find that this disclosure was proper. We note that the prosecution could also have obtained access to the returns for use in its tax case against defendant, by virtue of section §6103(h). 26 U.S.C. §6103(h) (1980).[3] As a result, even if the district court's disclosure of defendant's tax returns under section §6103(i) was improper, any error thereby resulting to defendant was harmless. *Cf. Davidson v. Brady*, 559 F.Supp. 456, 461 (W.D.Mich.1983). We additionally acknowledge, and concur with, the many cases holding that suppression of a defendant's tax return is an inappropriate remedy even in cases of plain error. *Marvin v. United States*, 732 F.2d 669, 673 (8th Cir. 1984); *United States v. Barnes*, 604 F.2d 121, 146 (2d Cir.1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980).

*3. Investigation by three grand juries*

[16] Third, defendant contends that the prosecution's presentation of the same or similar evidence to three grand juries constituted an abuse of the grand jury process in violation of *Petite v. United States*, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed. 2d 490 (1960), because it bifurcated the prosecution's investigation of defendant's case. Successive grand juries impaneled in Portland, Oregon, investigated defendant's case but for the reasons stated above did not return an indictment against him. The third grand jury, impaneled in Reno, Nevada, returned the indictment involved in this appeal.

In *United States v. Thompson*, 251 U.S. 407, 413-14, 40 S.Ct. 289, 291-92, 64 L.Ed. 333 (1920), the Supreme Court accepted the Government's contention that a grand jury's power is continuous and that adverse action or failure to act by a previous grand jury does not limit or exhaust a successor grand jury's power to investigate. Rule 6(e)(C)(iii) of the Federal Rules of Criminal Procedure furthermore authorizes transfer of one grand jury's material to another grand jury without court order. FED.R.CRIM.P. 6(e)(3)(C)(iii). The Rule thus contemplates that successive grand juries may investigate the same or similar crimes. Consequently, this court holds that the prosecution's presentation of evidence to three grand juries in this case violated no procedural rule or judicially-imposed limits on a grand jury's investigatory role.

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[3] Although defendant claims that Internal Revenue Service guidelines specified several procedural steps to be taken prior to release of tax information in tax-related cases, defendant concedes that no case requires adherence to any such guidelines. We note that *In re Gruberg*, 453 F.Supp. 1225, (S.D.N.Y.1978), stands for a contrary proposition because the case acknowledges that a grand jury inquiry can go forward without a recommendation from the Internal Revenue Service to the Department of Justice. We note, in addition, that many cases refuse to dismiss indictments based on challenges involving a federal agency's failure to adhere to its own guidelines. *United States v. Wilson*, 614 F.2d 1224, 1227 (9th Cir.1980); *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.1978) (per curiam); *cert. denied*, 439 U.S. 842, 99 S.Ct 133, 58 L.Ed.2d 140. Finally, we note that defendant's challenge to the use of his tax returns in procuring his indictment resembles the type of evidentiary challenge to grand jury procedures foreclosed by the Supreme Court in *United States v. Costello*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), and its progeny.

The presentation of evidence to three grand juries additionally did not violate the Supreme Court's decision in *Petite*, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960). In *Petite*, the Supreme Court granted the *Government's* motion to dismiss a federal indictment returned by a grand jury in violation of a Department of Justice policy forbidding successive state and federal prosecutions for the same crime. *Id.* at 530, 80 S.Ct. at 451. In *Petite*, the Supreme Court did not forbid, or even criticize the *investigation* of one crime by successive grand juries. In this case, although three grand juries investigated defendant's course of conduct, only one grand jury returned an indictment against him. The Government's presentation of evidence to these grand juries thus violated neither the letter nor the spirit of *Petite*.

[17] Moreover, even if the Government's presentation of evidence to three grand juries could be considered to have violated the Supreme Court's decision in *Petite*, a *Petite* violation does not compel dismissal of an indictment. *United States v. Garner*, *632 F.2d 758, 761 (9th Cir. 1980), cert denied*, 450 U.S. 923, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981); *United States v. Smith*, 595 F.2d 1176, 1181 (9th Cir. 1979); *United States v. Snell*, 592 F.2d 1083, 1087 (9th Cir. 1979), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315. As a result, this court would not order dismissal of the indictment returned against defendant even if the facts of this case presented a violation of *Petite*.

### *4. Employment of grand jury agents*

[18] Finally, defendant contends that this court must order dismissal of the indictment because the prosecution employed the service of certain "grand jury agents" in investigating this case, and thereby overrode the independence of the grand jury. We note that the foreman of the two Portland grand juries administered an oath to one Internal Revenue Service agent and four Federal Bureau of Invetigation agents, to the effect that the agents would report back to the grand jury the findings of their investigations and return to the grand jury any documents of which the grand jury should be made aware. The grand jury agents served subpoenas duces tecum upon various persons, which informed those persons that they could deliver the subpoenaed documents either to the grand jury agents or to the grand jury itself. The grand jury agents additionally examined the subpoenaed documents and discussed among themselves the relevance of the subpoenaed documents to the investigation. One grand jury agent, shortly before his swearing-in, informed the recipient of such a subpoena that the grand jury would swear him in as its agent in the near future. This agent later testified at length before the indicting grand jury in Reno.

The various cases addressing the propriety of employment of grand jury agents recognize that the Federal Rules of Criminal Procedure do not authorize such grand jury personnel. *See United States v. Kilpatrick*, 594 F.Supp. 1324, 1344 (D.Colo. 1984), *appeal docketed*, No. 84-2481 (10th Cir. Oct. 24, 1984). These cases analyze the employment of grand jury agents as a problem of unauthorized disclosure of grand jury material or as a problem of unauthorized presence during grand jury deliberations. *Id.* at 1329-30; *United States v. Carcaise*, 442 F.Supp. 1209, 1210 (M.D.Fla.1978). Both problems present violations of Rule 6 of the Federal Rules of Criminal Procedure. FED.R.CRIM.P. 6(d) (setting forth who may be present during grand jury deliberations); FED.R.CRIM.P. 6(e) (setting forth the circumstances under which, and to whom, disclosure of grand jury materials is proper). The cases acknowledge, however, that the danger arising from the employment of grand jury agents derives from the risk that such agents will override the independence of the grand jury, whether the employment of such agents is classified as an unauthorized presence or as an unauthorized disclosure. As the court noted in *United States v. Anderson*, 577 F.Supp. 223 (D.Wyo. 1983), *appeal docketed*, No. 83-2519 (10th Cir. Nov. 17, 1983) (argued April 18, 1985):

> The most important function of a grand jury is to stand between prosecuting authorities and the suspect as an unbiased valuator of evidence. That function cannot be maintained or understood by society when citizens are confronted by law enforcement agents who claim to be alter egos of the grand jury. . . . A grand jury that has become identified in the eyes of lay witnesses before it with law enforcement agents is not functioning independently of the prosecution. Such identification can only undermine public confidence that the grand jury is performing its constitutional function to check the power of the government.

*Id.* at 232.

Only two cases, to our knowledge, have ordered dismissal of an indictment due to the employment of grand jury agents. *United States v. Kilpatrick*, 594 F.Supp. at 1353 (D.Colo.1984) (*appeal docketed* as previously noted); *United States v. Anderson*, 577 F.Supp. at 234 (D.Wyo.1983) (*Appeal docketed* as previously noted). These cases, decided by the same district judge, involved conduct of a substantially more egregious nature than that alleged here. In *Kilpatrick*, for example, the prosecutor and not the foreman of the grand jury administered oaths to the agents. 594 F.Supp. at 1328. In addition, the agents appeared together as witnesses before the grand jury, outside the presence of Government counsel. *Id.* at 1330. Moreover, the court believed that the agents had remained present during an important colloquy between the prosecutor and the grand jurors. *Id.* Finally, the court suggested that the grand jury agents in fact were using their access to grand jury materials to further civil enforcement purposes of the Internal Revenue Service. *Id.* at 1331. In *Anderson*, the grand jury agents informed recipients of grand jury subpoenas that they were agents of the grand jury. 577 F.Supp. at 232. In addition, one grand jury agent informally granted immunity to a grand jury witness. *Id.*

In this case, only one grand jury agent revealed his (future) status as a grand jury agent to one recipient of a grand jury subpoena. No grand jury agent sought to immunize the testimony of grand jury witnesses from future prosecution. Moreover, the trial court gave no indication that it thought the grand jury agents were misusing their access to grand jury materials for civil enforcement purposes. Under these circumstances, this court finds the use of grand jury agents in this case similar to the use of postal employees in *United States v. Carcaise*, 442 F.Supp. at 1212, which was to gather and summarize grand jury evidence. Like the court in *Carcaise*, *id.*, this court holds that the employment of grand jury agents does not justify dismissal of the indictment.

[19] We note, in addition, that Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) authorizes disclosure of grand jury materials to federal officials such as the Federal Bureau of Investigation and Internal Revenue Service agents who assisted the prosecution in collecting evidence for the grand jury in this case. FED.R.CRIM.P. 6(e)(3)(A)(ii). *See also In re Gruberg*, 453 F.Supp. 1225, 1233-34 (S.D.N.Y.1978). We furthermore observe that the prosecution disclosed the names of these agents to the district court. *See* Fed.R.Crim.P. 6(e)(3)(B). Because the district court, after a hearing, did not believe that these agents sought access to the grand jury's materials for purely civil purposes, and because the record itself suggests no such intention, disclosure to the agents was proper under Rule 6(e)(3)(A)(ii) and did not require a court order pursuant to Rule 6(e)(3)(C). *See generally United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). We note that the legislative history to Rule 6(e)(3)(C)(iii) suggests an assumption on the part of Congress that FBI and IRS agents would perform investigatory functions preceding grand jury indictments. S.REP. NO. 95-354, 95th Cong., 1st Sess. 6, *reprinted in* 1977 U.S.CODE CONG. & AD.NEWS 527, 530. As a result, the five FBI and IRS agents in this case properly gained access to the grand jury's material.

We find no indication in the record that any one of the five grand jury agents remained present during the grand jury's consideration of unrelated evidence or during colloquies between the prosecutor and the grand jury. Thus the record suggests no unauthorized presence violation of Rule 6(d). FED.R.CRIM.P. 6(d). The one grand jury agent who appeared as a grand jury witness properly was present before the grand jury under the terms of the Rule.

Under the circumstance of this case, we find that the employment of grand jury agents did not override the independence of the grand jury. We observe, however, that the assistance of such federal employees, though essential to the progress of many complex or controversial investigations, may raise the possibility of claims of error unnecessarily.

### *C. Sufficiency of the Evidence*

Defendant's third contention challenges the sufficiency of the Government's evidence to support the jury's guilty verdicts on Counts V and VI. Counts V and VI charged that defendant willfully subscribed, under penalties of perjury, his 1979 and 1980 tax returns even though defendant did not believe the returns to be true and correct in material matters. 26 U.S.C. § 7206(1) (1967). Specifically, Counts V and VI charged that defendant grossly underreported, in his 1979 and 1980 tax returns, the amount of legal fees he received from his prior law firm for work he had performed before becoming a judge. The Government contends that defendant received approximately $41,000 in fee income in the 1979 tax year although defendant's 1979 tax return reported that he had only received approximately $22,000 in fee income that year. The Government furthermore contends that defendant received approximately $88,000 in fee income during the 1980 tax year although defendant's 1980 return reported no fee income. Defendant maintains that the fee income which he received during the 1980 tax year was included in a $150,000 figure representing the sale price of defendant's interest in his prior firm. The 1980 return reported the $150,000 sale price in a Schedule D in which defendant claimed a $100,000 capital loss on the sale of his interest in the firm. Defendant later conceded that the 1980 return inappropriately characterized his fee income during that year as a capital gain.

The Government proffered substantial evidence to support its claim that defendant had willfully underreported his fee income in the 1979 and 1980 returns. The Government submitted, for example, duplicates of checks sent to defendant from attorney working for his prior law firm, representing the fee income that defendant had earned before becoming a judge. The Government also submitted various bank records setting forth amounts that defendant deposited in his personal account after he received the fee income checks. Both parties agree that defendant did not deposit all of the checks but, rather, cashed several of the checks at neighborhood casinos. The Government's evidence suggested that defendant reported on his 1979 and 1980 tax returns all checks which he deposited, but failed to report any of the checks which he cashed at casinos.

The Government furthermore offered in evidence correspondence between defendant and Joseph Wright, the accountant who prepared defendant's 1979 tax return. This correspondence demonstrated that defendant supplied Wright with an estimate of his 1979 fee income which understated defendant's actual fee income by approximately $19,000. Other documentary evidence submitted by the Government demonstrated that Wright relied on this estimate in preparing defendant's 1979 tax return and in disclosing defendant's financial status to a lender from whom defendant was seeking a mortgage.

With respect to defendant's 1980 return, the Government offered as evidence defendant's sudden firing of Wright after thirty years of service and hiring of Jerry Watson, head of Creative Tax Planning. Watson prepared defendant's 1980 return, for which defendant paid Watson $2,000, as compared to the $600 fee he had paid Wright. The Government also submitted defendant's request for an extension of time to file his 1980 return, which defendant prepared himself, in which defendant estimated his tax liability would exceed $42,000. The 1980 return, however, claimed a refund in excess of $44,000. Watson completed the 1980 return in pencil, and left erratic marks in the margin of the return and elsewhere. Defendant's counsel conceded at oral argument that the return cried out for an audit.

Defendant did not seek to rebut all of the evidence offered by the Government to prove that defendant willfully understated his 1979 and 1980 taxable income. Rather, defendant, while testifying at trial, consistently asserted that the understatements were not willful because he relied in good faith on the expertise of Wright and Watson when he signed his 1979 and 1980 returns. Defendant maintains that he made full disclosure to Wright and to Watson of all income he received during these years, and that he justifiably relied on their tax advice when he signed the returns which they had prepared for him. A major dispute between the parties at trial centered around a letter allegedly delivered personally by defendant's secretary to Wright in which defendant claims to have disclosed accurately his 1979 fee income. Defendant's secretary, Judy Ahlstrom, testified that she delivered the letter to Wright's office. Wright testified at trial that he did not receive the letter and that he never lost documents from his clients.

With respect to his 1980 return, defendant contends that his sudden hiring of Jerry Watson does not indicate an intent to understate his fee income, but simply a lawful desire to change accountants. Defendant asserts that the fee paid to Watson was not unreasonably high, but rather that the fee charged by Wright was unreasonably low. Defendant maintains that he innocently relied on Watson's ability to prepare correctly his 1980 return, and, because defendant was generally ignorant of the niceties of the tax law, he had no reason to doubt its accuracy. All of this, defendant contends, proves a lack of willfullness on his part in subscribing his name to the 1980 return.

There is no claim, however, that Judge Hoffman erred in charging the jury. Therefore we have only to decide whether the Government presented enough evidence from which a jury rationally could have concluded that Claiborne willfully filed false income tax returns. We regard the Government's evidence as ample.

[20-23] Proof of willfulness is essential to support a conviction under section 7206(1). *United States v. Bishop*, 412 U.S. 346, 361, 93 S.Ct. 2008, 2017, 36 L.Ed.2d

941 (1973); *United States v. Pallan*, 571 F.2d 497, 501 (9th Cir.1978). To prove willfulness, the Government must show that defendant intended to violate the law or knew that his actions would do so. *United States v. Pomponio*, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976) (per curiam). The cases make clear that neither a careless disregard whether one's actions violate the law nor gross negligence in signing a tax return will suffice. *United States v. Loney*, 719 F.2d 1435, 1436 (9th Cir.1983). The Government, however, may base its proof of willfulness on circumstantial evidence indicating that defendant knew or must have known that his returns were false. *Black v. United States*, 309 F.2d 331, 342 (8th Cir.1962) (inferring willfulness from any conduct the likely effect of which is to mislead or conceal).

[24] In addition, a defendant may rebut the Government's proof of willfulness by establishing good faith reliance on a qualified accountant after full disclosure of tax-related information. *Bursten v. United States*, 395 F.2d 976, 981 (5th Cir. 1968), *cert. denied*, 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972). As the Seventh Circuit recently observed in *United States v. Whyte*, 699 F.2d 375 (7th Cir. 1983):

> It is a valid defense to a charge of filing a false return if a defendant provides full information regarding his taxable income and expenses to an accountant qualified to prepare federal tax returns, and . . . the defendant adopts and files the return as prepared without having reason to believe it is incorrect.

*Id.* at 379.

On the other hand, a defendant cannot shift his responsibility for deficiencies to an accountant if the defendant has withheld vital information or has taken steps to mislead his accountant. *United States v. Garavaglia*, 566 F.2d 1056, 1060 (6th Cir. 1977); *Bender v. Commissioner*, 256 F.2d 771, 774 (7th Cir 1958).

[25, 26] In the case of Claiborne's 1979 tax return, the parties hotly disputed whether defendant made full disclosure of his 1979 fee income to Joseph Wright. As we have noted, defendant claims that he made full disclosure in a letter delivered by his secretary to Wright's office. Wright, on the other hand, testified that he received no such letter. The resolution of that factual dispute was of course for the jury and we see no basis to question its determination to credit Wright's testimony over that of Claiborne and his secretary. Because we must draw all reasonable inferences from the evidence in favor of the Government, we cannot find that the jury incorrectly disregarded defendant's reliance defense. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 57 L.Ed.2d 1 (1979); *United States v. Beecroft*, 608 F.2d 753, 756 (9th Cir. 1979); *Cosby v. Jones*, 682 F.2d 1373, 1382 (11th Cir. 1982). We observe, in addition, that the jury, in viewing the Government's evidence that defendant incorrectly stated his 1979 fee income in a different letter to Wright and the Government's evidence that defendant failed to report any checks cashed at casinos, may have decided that defendant deliberately sought to mislead Wright and therefore was not entitled to invoke the reliance defense. *United States v. Scher*, 476 F.2d 319, 321 (7th Cir.1973). We observe that the amounts of the checks defendant cashed at casinos were large (in one instance as large as $3,000), appearing to be more than mere pocket money. We therefore determine, after reviewing evidence, that a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. 2789; *Burks v. United States*, 437 U.S. 1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978).

[27] We base our conclusion with respect to the 1980 return on similar grounds. Here, the crucial issue before the jury was not whether defendant made full disclosure to Jerry Watson, but rather whether he relied in good faith on Watson's advice. Defendant's own understanding of tax issues is highly relevant to the question of his good faith reliance on Jerry Watson. *See United States v. Whyte*, 699 F.2d at 380. The parties agree that defendant presided as district court judge over some tax law disputes. Nevertheless, defendant consistently has maintained that he is not a tax expert and has had no significant experience with the distinction between ordinary income and capital gain.

The jury obviously did not believe defendant and found his claims of ignorance to be disingenuous. The support for that conclusion is strong. We assume that defendant gained some familiarity with concepts as basic to the tax law as the distinction between ordinary income and capital gain during his law school studies, his thirty odd years of practicing law, and his three years on the bench before filing the 1980 return. *Compare Lurding v. United States*, 179 F.2d 419, 420 (6th Cir.1950) (where defendant was uneducated and unfamiliar with taxes, bookkeeping and accounting). We note that defendant reported his fee income as ordinary income in all years previous to 1980, when he reported the income as a capital gain. We observe, in addition, that defendant reviewed the 1980 return for ten or fifteen minutes before signing his name to it. During this time, defendant must have seen, at the least, that Watson had completed the return erratically, and in pencil. Defendant most likely also observed at this time that Watson's return reported no fee income.

[28] In reviewing the jury's decision to convict, we must draw all reasonable inferences from the evidence in favor of the Government. *United States v. Spetz*, 721 F.2d 1457, 1477 (9th Cir.1983). On this record, we have no trouble concluding that a rational trier of fact could have found defendant guilty of Count V and Count VI beyond a reasonable doubt. See *United States v. De Jardins*, 747 F.2d 499, 507 (9th Cir.1984).

### *D. Trial Errors*

Defendant's final contentions on appeal relate to various alleged errors made by the district court prior to and during defendant's second trial. Four of these alleged errors merit discussion.

*1. Failure to excuse for cause two prospective jurors*

First, defendant asserts that the district court's refusal to excuse for cause two prospective members of the jury unconstitutionally forced him to exercise two of his allotted peremptory challenges, all of which he eventually exhausted, thereby forfeiting his right to exercise those challenges against two other veniremen and impairing his Sixth Amendment right to an impartial jury. *See United States v. Martin*, 749 F.2d 1514, 1518 (11th Cir.1985). Defendant contends that these two prospective jurors exhibited actual bias towards him and thus the district court should have granted his motions to excuse them from jury service for cause. Defendant also claims that the district judge asked these two prospective jurors leading questions, which did not elicit objectively whether the jurors could decide the case without bias or prejudice. We disagree with this characterization of the judge's colloquies with the jurors and find that the judge fairly gave them the opportunity to reveal, without embarrassment, any bias or prejudice which they felt against defendant.

[29] Defendant does not contend, however, that the jury which convicted him was biased. Rather, his objection to the district court's failure to exclude the two prospective jurors rests on the theory that it is constitutionally impermissible to force defendants to exhaust their peremptory challenges on persons who should be excused for cause. *See United States v. Daly*, 716 F.2d 1499, 1507 (9th Cir.1983), *cert. dismissed*, —— U.S. ——, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977). We agree, and reaffirm that the peremptory challenge is an important safeguard of a defendant's Sixth Amendment right to an impartial trial. *See Hines v. Enomoto*, 658 F.2d 667, 672 (9th Cir.1981); *United States v. Giacalone*, 588 F.2d 1158, 1164 (6th Cir. 1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979). *See also Rosales-Lopez v. United States*, 451 U.S. 182, 188 n. 6, 101 S.Ct. 1629, 1634 n. 6, 68 L.Ed.2d 22 (1981); *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965).

[30] Even though this court agrees that forcing a defendant to expend peremptory strikes may implicate the Sixth Amendment, *Celestine v. Blackburn*, 750 F.2d 353, 360 (5th Cir.1984), a constitutional problem only arises in cases where a prospective juror upon whom defendant spent a peremptory challenge was actually biased and therefore should have been excluded by the trial judge. *United States v. Allsup*, 566 F.2d at 71. That is not the case here. One prospective juror, Robert Whitten, indicated during voir dire that he had a preconception of defendant's guilt or innocence and that defendant would have to come forward with evidence to overcome this preconception. The trial judge then instructed Whitten that a criminal defendant enjoyed a constitutional presumption of innocence and made clear to Whitten that defendant did not have to come forward with proof of innocence but rather the prosecution had to come forward with proof of defendant's guilt beyond a reasonable doubt. Whitten subsequently indicated that he would decide defendant's guilt or innocence impartially, on the evidence presented at trial and according to the law charged by the court.

A second prospective juror, Susan Varnum, indicated during voir dire that she did not like defendant's appearance and admitted that she had formed an opinion on defendant's guilt or innocence as a result of the media coverage of defendant's case. Varnum also indicated, however, that she did not believe in trying cases through the newspapers and that defendant would not have a burden to overcome due to her personal attitude towards his appearance. Varnum furthermore expressed to the trial court that she was willing and able to judge the evidence in the case in an impartial manner.

[31] Under these circumstances, we cannot find that the district court committed a manifest error or an abuse of its broad discretion in failing to excuse for cause

jurors Whitten and Varnum. *Celestine v. Blackburn*, 750 F.2d at 360; *United States v. Giacalone*, 588 F.2d at 1164. Few aspects of a jury trial are more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. *United States v. Gullion*, 575 F.2d 26, 29 (1st Cir.1978). Moreover, trial courts possess a peculiar ability to determine whether a prospective juror's claimed ability to decide a case impartially is genuine. *Patton v. Yount*, —— U.S. ——, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). A prospective juror's statement that he has some impression about the case or a party is a frank and honest answer to the court's inquiry, and the juror's statement that he can lay aside his impressions and decide the case on the evidence presented and the charge of the court should also be weighed in the discretion of the trial judge.

Here, the district court determined, based on the prospective jurors' responses, that Whitten and Varnum would weigh the evidence in the case impartially despite their initial preconceptions of defendant's guilt or innocence. We do not find this decision an abuse of the district court's discretion. Indeed, the fact that defendant took advantage of his peremptory challenges to strike Whitten and Varnum may reflect "not a denial of justice," but a proper utilization of the peremptory tool. *United States v. Giacalone*, 588 F.2d at 1164.

### 2. *Failure to order disclosure of Jencks Act statements*

Second, defendant contends that the district court committed reversible error because the court erroneously declined to provide the defense, pursuant to the terms of the Jencks Act, 18 U.S.C. § 3500 (1985), certain "302" summaries of FBI interviews with a key Government witness, concluding that the summaries did not contain material subject to disclosure under the Act. Specifically, defendant maintains that the district court improperly refused to disclose statements made by Joseph Wright to FBI agents during interviews with Wright prior to trial. Defendant contends that these statements would have impeached Wright's trial testimony and, because Wright's testimony materially affected the jury's decision to convict him, that the court's refusal to disclose these statements prejudicially affected defendant's substantial rights.

One such statement suggested that Wright had misplaced or destroyed pre-1976 records during his move to a new office. Wright testified that he did not lose or misplace any records pertaining to defendant. Defendant maintains that Wright's loss of pre-1976 records may have suggested to the jury the possibility that Wright mistakenly included a letter written by defendant to Wright in 1980 in the records that Wright lost or destroyed before he moved to new quarters. Other statements included a reference by Wright to a Mr. Swanson, who helped Wright in his accounting business, a statement by Wright that he did not "cross-examine" his clients, and a statement by Wright that his work for defendant decreased when defendant became a judge. The trial court refused to order disclosure of this material on the ground that the summaries containing this material were not in fact "statements" by witness Wright.

In reviewing the district court's refusal to disclose the 302 forms to defendant, this court must ponder two questions. First, we must consider whether the 302 forms included "statements" of witness Wright within the meaning of the Jencks Act. Second, we must consider whether, assuming the 302 forms did contain such statements, the district court's refusal to order their disclosure prejudicially affected defendant's substantial rights. *United States v. Long*, 715 F.2d 1364, 1368 (9th Cir.1983).

[32] The Jencks Act restrictively defines those "statements" by a witness which are subject to disclosure. Specifically, the Act provides:

> The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means——
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e) (1985). The 302 summaries of interviews conducted by Government agents with witness Wright cannot fall within subsection (1) of 18 U.S.C. § 3500(e) because Wright did not draft the summaries or otherwise approve their contents. *Compare Goldberg v. United States*, 425 U.S. 94, 103, 96 S.Ct. 1338, 1344, 47 L.Ed.2d 603 (1976). Indeed, the record is bereft of evidence to suggest that Wright

saw the 302 forms at all. Similarly, the 302 summaries cannot fall within subsection (3) of 18 U.S.C. § 3500(e) because Wright did not make any "statements" contained therein to a grand jury. 18 U.S.C. § 3500(e)(3) (1985).

[33] Furthermore, this court finds that the 302 summaries do not fall within subsection (2) of 18 U.S.C. § 3500(e) because the summaries do not purport to transcribe in a substantially verbatim fashion Wright's various interviews with Government agents. Rather, the summaries represent, in our view, the *agents'* selection of certain information conveyed by Wright for possible use in the Government's case against defendant. *See Palermo v. United States*, 360 U.S. 343, 355 n. 12, 79 S.Ct. 1217, 1226 n. 12, 3 L.Ed.2d 1287 (1959) (characterizing an agent's 600 word summary of a 3½ hour conference with a Government witness as the agent's selection of items deemed appropriate for inclusion rather than a virtually verbatim narrative of what the witness said). *Accord United States v. Bernard*, 625 F.2d 854, 859 (9th Cir.1980); *United States v. Edwards*, 702 F.2d 529, 531 (5th Cir.1983); *United States v. Durham*, 587 F.2d 799, 802 (5th Cir.1979). The summaries additionally fail to satisfy the requirements of 18 U.S.C. § 3500(e)(2) because the agents did not draft them contemporaneously with Wright's responses during the interviews. 18 U.S.C. § 3500(e)(2) (1985). We believe that the district court properly characterized the summaries as non-Jencks Act material and, therefore, correctly declined to disclose their contents to defendant. Under these circumstances, we cannot find, as we must to overturn a district court's Jencks Act decision, that the district court's characterization was clearly erroneous, *United States v. Hodges*, 556 F.2d 366, 368 (5th Cir.1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1978), or an abuse of discretion, *Government of Virgin Islands v. Lovell*, 410 F.2d 307, 310 (3rd Cir.1969), *cert. denied*, 396 U.S. 964, 90 S.Ct. 440, 23 L.Ed.2d 428.

[34] Moreover, even if the district court's refusal to disclose the summaries to defendant was clearly erroneous or an abuse of discretion, we do not believe that the district court's decision prejudically affected defendant's substantial rights. *United States v. Johnson*, 521 F.2d 1318, 1320 (9th Cir.1975). The only information contained in the summaries that could be damaging to Wright's credibility, and therefore helpful to the defense, is Wright's admission that he lost or mislaid some records during his move to a new office.[4] The record demonstrates, however, that defendant did cross-examine Wright with respect to this loss of records at defendant's first trial. Thus, defendant had knowledge of the loss and made use of that knowledge without access to the summaries. Under these circumstances, the court's refusal to disclose the summaries to defendant did not prejudice defendant's substantial rights. *Government of Virgin Islands v. Lovell*, 410 F.2d at 311. *See also United States v. Johnson*, 521 F.2d at 1320.

### 3. *The prosecution's failure to disclose Brady material*

[35] Third, defendant contends that the prosecution's failure, following defendant's request to deliver these 302 summaries of interviews between Government agents and Wright deprived defendant of a fair trial under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Prior to trial, defendant requested from the Government any statements in its possession which would tend to impeach the credibility of any Government witness, including but not limited to statements contradicting other statements by such persons. Defendant asserts that the 302 summaries contained such impeachment evidence, because the summaries suggested, among other things, that Wright may have misplaced important correspondence that he had received from defendant. Wright testified at trial that he never lost records pertaining to defendant. Defendant contends that the prosecution's failure to disclose this material might have affected the jury's verdict and consequently demands a new trial.

The Supreme Court's decision in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), provides the framework for our analysis of the prosecution's failure to disclose this impeachment evidence. In *Agurs*, the Supreme Court reaffirmed its holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that due process requires a prosecutor to disclose material exculpatory information in its possession to the defense. *Id.* at 105–06, 96 S.Ct. at 2389–99. The Supreme Court announced different "materiality" tests, however, according to the specificity of a defendant's request for information. *Id.* at 106, 112, 96 S.Ct. at 2398–

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[4] Ordinarily, the Jencks Act discourages courts from speculating on what use defendants would make of witness statements. *United States v. Bibbero*, 749 F.2d 581, 585 (9th Cir.1984). In the case before us, however, defendant concedes that he would have used the information relating to Wright's loss of pre-1976 records to impeach Wright's testimony that he never lost records pertaining to defendant.

2401. If a defendant made a specific request for exculpatory information, which gave the prosecution notice of exactly what the defendant desired, undisclosed exculpatory information would be material if it might have affected the outcome of defendant's trial. *Id.* at 106, 96 S.Ct. at 2398. On the other hand, if a defendant made either a general request for exculpatory information or made no request, the undisclosed exculpatory information would not be material unless it created a reasonable doubt that did not otherwise exist. *Id.* at 112, 96 S.Ct. at 2401.

Defendant's request for information in the Government's possession which would tend to impeach the credibility of any Government witness was a general and not a specific request. *See United States* v. *Shelton*, 588 F.2d 1242, 1249 n. 10 (9th Cir.1978) (characterizing a request for everything tending to impeach the credibility of an *identified* witness as a general request) *cert. denied*, 442 U.S. 909, 99 S.Ct. 2822, 61 L.Ed.2d 275 (1979); *Ostrer* v. *United States*, 577 F.2d 782, 786 (2d Cir.1978) (characterizing a request for material useful to cross-examine an *identified* witness with respect to bias as a general request) *cert. denied*, 439 U.S. 115, 99 S.Ct. 1018, 59 L.Ed.2d 73 (1979); *United States* v. *DiCarlo*, 575 F.2d 952, 959 (1st Cir.1978) (characterizing a request for all evidence favorable to defendant, including impeachment evidence, as a general request) *cert. denied*, 439, U.S. 834, 99 S.Ct. 115, 58 L.Ed.2d 129. We note that defendant's request did not focus on a particular witness, *United States* v. *Mackey*, 571 F.2d 376, 389 (7th Cir.1978), or on particular sources of witness statements, such as 302 forms. *Compare United States* v. *Warhop*, 732 F.2d 775, 778 (10th Cir.1984). Under these circumstances, we find that defendant's request did not give the prosecution notice of exactly what information defendant desired. *United States* v. *Agurs*, 427 U.S. at 106, 96 S.Ct. at 2398.

Because defendant's request was general and not specific, the prosecution's failure to disclose the impeachment evidence contained in the 302 summaries will only justify a new trial if the evidence would have created a reasonable doubt that did not otherwise exist. *United States* v. *Agurs, Id.* 427 U.S at 112, 96 S.Ct. at 2401. *See also United States* v. *Lasky*, 548 F.2d 835, 839 (9th Cir.1977) (per curiam), *cert. denied*, 434 U.S. 821, 98 S.Ct. 63, 54 L.Ed.2d 77. Under the circumstances of this case, we find that disclosure of the evidence would have created no such doubt. We acknowledge, of course, that credibility evidence can be material. *Giglio* v. *United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). We acknowledge, in addition, that nondisclosure which impairs a defendant's ability effectively to cross-examine key witnesses may threaten to deprive a defendant of a fair trial. *Bagley* v. *Lumpkin*, 719 F.2d 1462, 1464 (9th Cir.1983) *reversed on other grounds*, —— U.S. ——, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Nevertheless, we find that the prosecution's failure to disclose the 302 summaries in this case did not impair defendant's ability to cross-examine Wright effectively because defendant in fact had access to the most damaging impeachment evidence contained in the summaries and used this evidence to impeach Wright's credibility at the first trial. *Cf. United States* v. *Peters*, 732 F.2d 1004, 1009 (1st Cir.1984). Accordingly, the prosecution's disclosure of the impeachment evidence contained in the summaries would have told defendant nothing of importance that he did not know already. *United States* v. *Truong Dinh Hung*, 667 F.2d 1105, 1107 (4th Cir.1981) (per curiam), *cert. denied*, 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982). Under these circumstances, we cannot find that the prosecution's failure to turn over the 302 summaries to defendant deprived defendant of a fair trial. *Cf. United States* v. *Prior*, 546 F.2d 1254, 1259 (5th Cir.1977).

Indeed, we would reach the same conclusion even if we construed defendant's request for impeachment evidence as a specific request, as one decision from this circuit advises us to do. *United States v. Goldberg*, 582 F.2d 483, 489 (9th Cir.1978), *cert. denied*, 440 U.S. 973, 99 S.Ct. 1538, 59 L.Ed.2d 790 (1979). Because the impeachment evidence was duplicative of information that defendant possessed prior to his second trial, we cannot find that the prosecution's failure to disclose the impeachment evidence was "material" to defendant's conviction under either standard enunciated in *Agurs*. *United States v. Agurs*, 427 U.S. at 106, 112, 96 S.Ct. at 2398, 2401. As a result, we hold that the district court correctly determined that any failure to disclose which occurred in this case did not justify a new trial.

### 4. *Improper sequestration of a defense witness*

[36] Finally, defendant contends that the district court committed an abuse of discretion by improperly sequestering defense witness Judy Ahlstrom during a brief recess in the middle of her testimony concerning her alleged delivery to Wright of a letter from Claiborne disclosing the full extent of his 1979 fee income. As we indicated previously, Ahlstrom was, and apparently still is, defendant's secretary of many years. Defendant asserts that the trial judge prevented defense counsel from calm-

ing Ahlstrom during this recess, even though Ahlstrom had become visibly upset during her previous testimony. Because Ahlstrom's testimony, and her credibility, were crucial to defendant's case, defendant maintains that the trial court's refusal to allow defense counsel to calm her during this recess prejudicially affected the outcome of defendant's trial. We are not unmindful of the fact that this was the only instance of witness sequestration during defendant's trial. We are not persuaded, however, given the circumstances of this case, and Ahlstrom's obvious problems during her testimony, that her sequestration amounted to reversible error.

The record does not disclose why the trial judge ordered a recess, although it does reflect the court's determination that a recess at that particular time was an urgent necessity. This court will not engage in speculation as to the trial court's motives. Rather, we note the broad discretion enjoyed by a trial judge with respect to the mode of interrogating witnesses and presenting evidence, FED.R.EVID. 611(a), and emphasize that this discretion includes the ability to order a recess as circumstances necessitate. This broad discretion over the mechanics of a trial furthermore includes the ability to order sequestration of a witnesss. *See Geders v. United States*, 425 U.S. 80, 87, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). In *Geders*, The Supreme Court observed:

> Our cases have consistently recognized the important role the trial judge plays in the federal system of criminal justice. The judge is not a mere moderator but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. A criminal trial does not unfold like a play with actors following a script, there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. . . . The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during and after their testimony.

*Id.* at 86-87, 96 S.Ct. at 1234-1335. The Court held, however, that this broad power to sequester a witness did not include the power to impair a *defendant's* right to the effective assistance of counsel by ordering a defendant not to discuss his trial with his attorney during a significant recess. *Id.* at 91, 96 S.Ct at 1336. *Accord United States v. Romano*, 736 F.2d 1432, 1435 (11th Cir.1984). We note that the trial court's sequestration of witness Ahlstrom did not impinge upon defendant's Sixth Amendment right to the effective assistance of his counsel in this case. Thus, defendant's reliance upon cases precluding sequestration of *defendants* on Sixth Amendment grounds is misplaced.

Our research reveals only one case in which a court has held that sequestration of a non-party witness may constitute reversible error under *Geders. United States v. Romano*, 736 F.2d at 1439. In that case, the Eleventh Circuit reversed a defendant's conviction because the trial court had prevented his co-defendant, whose testimony was crucial to the first defendant's case, from communicating with his attorney with respect to his own testimony during a recess which lasted several days. *Id.* The court limited its holding to the peculiar facts of the case, however, and remarked that its holding "by no means implie[d] that a co-defendant's conviction typically will be reversed on *Geders* grounds." *Id.*

We see no reason to extend the Eleventh Circuit's holding to the facts of this case. We note that the recess in this case was brief and that Ahlstrom resumed her testimony immediately after the recess ended. The trial judge apparently ordered Ahlstrom sequestered during the recess in order to prevent improper influences upon her testimony, a purpose endorsed by the Supreme Court in *Geders*. *Geders v. United States*, 425 U.S. at 87, 96 S.Ct at 1334. Under the circumstances of this case, we find that the trial court's sequestration of Ahlstrom during a brief recess was a proper exercise of discretion.

## III. CONCLUSION

This court holds, having considered all of the claimed errors meriting attention:

(1) that Articles I and III of the Constitution did not render defendant immune from prosecution,

(2) that the government did not engage in unconstitutional abuse of the grand jury process,

(3) that the evidence presented at trial was sufficient to sustain defendant's conviction, and

(4) that various alleged trial errors do not mandate a new trial.

We have considered other errors advanced by defendant, explicitly or implicitly, including a suggestion that he was the victim of selective prosecution; that the trial judge improperly refused to consider the effect of the trial's publicity in the Nevada newspapers (some of which was unfavorable to the *Government*); the unusual extent to which the Government gave concessions to Conforte; the Government's treatment of an IRS agent who apparently did not favor an investigation of defendant; and grand jury investigations of other persons associated with defendant. Because we find on the record an insufficient basis to justify reversal of defendant's conviction on these and other grounds, this court accordingly AFFIRMS the judgment of conviction on Counts V and VI.

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UNITED STATES

v.

CLAIBORNE

No. 84-1294.

United States Court of Appeals, Ninth Circuit

Dec. 30, 1985

FERGUSON, Circuit Judge, dissenting from the order denying hearing *en banc*.

The refusal of the court to rehear this case *en banc* is lamentable. When the prosecution withholds vital exculpatory information, justice is denied. Rehearing *en banc* is necessary to correct the substantial curtailment of a defendant's right to discover impeachment material pursuant to the Jencks Act, 18 U.S.C. § 3500, and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Defense access to exculpatory or impeachment evidence within the government's possession is a vital constitutional and statutory right. *See Brady*, 373 U.S. at 87, 83 S.Ct. at 1196; *United States v. Polizzi*, 500 F.2d 856, 893 (9th Cir.1974) ("The prosecution is obligated to disclose to the defense statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment."), *cert. denied*, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975). Impeachment evidence plays a pivotal role in any trial, *see, e.g., Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974), and withholding impeachment evidence in this case denied the defendant an effective defense.

Claiborne, a United States district court judge, was convicted of income tax evasion. His accountant, Wright, was an important prosecution witness. At trial, Claiborne presented evidence that his secretary delivered a letter to Wright revising the amount of his income. Wright testified that he had no recollection of receiving the letter and further that he never lost client files. Thus, Claiborne's conviction hinged on Wright's credibility. Regrettably, the government and the trial judge failed to furnish Claiborne during the trial with damaging pretrial statements made by Wright.

Government agents' summaries of pretrial interviews with Wright indicate that he admitted to them that a substantial number of his client's files had been "thrown away." Despite a standing request under the Jencks Act and *Brady* for witnesses' pretrial statements, the defense learned of the summaries only after trial. At a posttrial hearing, the trial judge disclosed the existence of the summaries of the Wright interviews.

Although the judge reviewed some of the *in camera* material during trial, he examined none of the Wright material at that time. At the posttrial hearing, he reviewed some of the Wright material and concluded that none of it was Jencks Act or *Brady* impeachment material. Further, he failed to examine the remaining *in camera* material, some of which might have impeached Wright's testimony.

On appeal, the panel admitted that the Wright summaries were *Brady* impeachment evidence, but erroneously concluded that the failure to disclose the material was not prejudicial to the defense. *United States v. Claiborne*, 765 F.2d 784, 802-04 (9th Cir. 1985). The panel's *Brady* analysis ignored *United States v. Bagley*, —— U.S. ——, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), announced six days before *Claiborne*. Under *Bagley*,

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

> would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

*Id.* at 3384. The panel should have decided whether suppression of the Wright interview material "undermined confidence in the outcome of the trial." Instead, the panel employed a two part test: whether the evidence would have "created a reasonable doubt" or whether it "might have affected the outcome" of the trial. *Claiborne*, 765 F.2d at 802-03.

Ample evidence from the record supports the conclusion that suppression of the material undermines confidence in the trial outcome. Wright was a key witness in the government's case. Evidence that a significant number of his clients' files had been discarded, directly contradicting his earlier testimony, would certainly undermine his credibility sufficiently for the jury to conclude that the defendant had testified truthfully. Thus, Claiborne's conviction should have been reversed because the government withheld *Brady* impeachment evidence of one of its key witnesses.

Similarly, the panel's Jencks Act analysis was incorrect. The panel denied Claiborne access to the Wright summaries because they were not transcribed "in a substantially verbatim fashion" and the government agents did not draft them contemporaneously with Wright's interview. *Id.* at 801. After *Claiborne*, the government need only produce 18 U.S.C. § 3500(e)(1) statements actually read or drafted by the witness, and 18 U.S.C. § 3500(e)(2) statements drafted by an agent before the interview is over. This reasoning conflicts with *Campbell v. United States*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963), and significantly reduces a defendant's ability in this circuit to obtain witness statements taken by government agents.

Under *Campbell*, section 3500(e)(1) statements need not be signed or written by the witness, or even be a substantially verbatim recording of a prior statement. *Id.* at 492 n. 6, 83 S.Ct. at 1360 n. 6. The Court held that the FBI agent's recitation of the "substance" of his rough notes, which were "not a complete word-for-word transcription" of the interview, demonstrated sufficient adoption by the witness for purposes of the Jencks Act when the witness told the agent "he had got it straight." *Id.* at 489-90, 83 S.Ct. at 1359-60. The FBI agent wrote his report, based on rough notes and personal memory, seven hours after the witness interview. *Id.* at 490, 83 S.Ct. at 1359. The Court imposed no requirement or expectation that the agent draft a witness statement during an interview. Rather, *Campbell* recognized the informal and commonplace FBI practice of taking rough notes during an interview and later transcribing them into statements. This practice in *Campbell* made the witness statements no less susceptible to disclosure under the Jencks Act.

The fundamental error the panel committed was its failure to conduct an independent examination of the materials on which the trial court based its rulings. I fail to see how the panel, without looking at that material, could have fairly decided whether those rulings were erroneous. A reviewing court has an obligation to examine *Brady* and Jencks Act material to ensure that the district court's rulings were correct. *See Campbell*, 373 U.S. at 493, 83 S.Ct. at 1360. After the district court judge opened the *in camera* material at the postrial hearing, he resealed the withheld documents. The documents have not been unsealed or read by anyone since the district court's posttrial hearing.

The *en banc* call in this case has been difficult for the judges of this circuit. It may be that hearing the case *en banc* and potentially reversing the conviction would be viewed by the public as defending one of our own rather than fairly applying the law. However, a defendant's right to a constitutionally fair trial cannot be balanced against the perception of others. Of course, we have an obligation to ensure that the circuit's actions are evenhanded and unbiased. But that duty is not jeopardized here. We must uphold our responsibility to remedy violations of constitutional rights, and I dissent from the court's refusal to hear this case *en banc*.

UNITED STATES

v.

CLAIBORNE

No. 84-1294.

United States Court of Appeals, Ninth Circuit

Jan. 30, 1986.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent from the court's refusal to hear Judge Claiborne's appeal en banc.

This case is a most unusual one in a number of respects. It raises serious questions about the fair and impartial administration of justice.

## I

## BACKGROUND

United States District Judge Harry E. Claiborne was originally indicted and tried in the United States District Court on four counts involving his alleged acceptance of bribes in the performance of his official duties, two counts of tax evasion unrelated to the alleged bribes, and one count of filing a false financial statement with the Judicial Ethics Committee. The false filing count was also unrelated to the bribery charges. The first jury was unable to reach a verdict on any of the counts, and a mistrial was declared. The government then dropped the most serious charges—the allegations relating to bribery—and Judge Claiborne was retried only on the unrelated tax and false filing counts. The second jury acquitted him of filing a false financial statement, but convicted him on the tax charges.

Judge Claiborne was tried before an out-of-circuit senior district judge specially assigned to preside over his case. The district judge sentenced him to a two-year term of imprisonment. A specially selected panel composed of three judges from other circuits affirmed his conviction. 765 F.2d 784. Judge Claiborne petitioned for a rehearing and suggested a rehearing en banc. The special panel denied the petition for rehearing and recommended that we reject the suggestion for a rehearing en banc. An active member of this court then called for a vote by the full court on whether to rehear the appeal en banc. The full court has now voted, and decided not to grant Judge Claiborne a rehearing.[1]

Throughout these proceedings, Judge Claiborne has claimed that his investigation and prosecution constituted a part of an effort by the Department of Justice's Organized Crime Strike Force and the F.B.I. to discredit him personally and bring about his removal from the bench. Prior to his appointment in 1978, Judge Claiborne had been a prominent trial lawyer and had defended numerous individuals accused of committing criminal offenses. He contends that after his appointment the government launched a vendetta against him as a result of his issuance of a number of sigificant rulings adverse to the Department of Justice in criminal cases.

The Strike Force and the F.B.I. appear to have begun investigating Judge Claiborne in early 1980. According to Claiborne, in the Spring of 1980 he was investigated by a Las Vegas grand jury at the request of those agencies. The investigation related to Claiborne's actions as a criminal defense attorney, particularly with regard to whether Claiborne participated in illegal wiretapping activities. Apparently the investigation proved fruitless and the grand jury, after several months of hearings, failed to return an indictment against Judge Claiborne. However, a local law enforcement officer who had supplied evidence exculpating Judge Claiborne was demoted to a desk job and was himself investigated by the F.B.I.

On April 4, 1980 United States Marshals seized from the offices of the Strike Force a display satirizing Judge Claiborne and Chief Judge Foley. Claiborne's attorney had complained that the exhibit was intimidating and prejudicing members of the grand jury that was investigating the Judge, as well as witnesses who were testifying before the grand jury. At a subsequent hearing, Judge Foley described the display as "contemptuous" of the judicial process and the result of "gross misconduct."

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[1] As is explained at p. 1330, *infra*, six out of 25 active judges recused themselves and did not participate in the vote.

Judge Claiborne alleges that the F.B.I.'s next step, taken in late 1980, was to launch another investigation of him on a different subject, and this time to open his mail. Judge Claiborne claims that when he unsealed an envelope he had received through the mail it contained not only the enclosure intended for him but also an enclosure sent to another individual, a person who was also a target of the then current F.B.I. investigation. According to Claiborne, that investigation concerned his sentencing of Gus Gallo, a convicted bookmaker, and resulted from the belief of some Justice Department officials that Gallo had not received a sufficiently severe sentence. The Gallo investigation also apparently came to nought.

Next, the government obtained statements from one Joseph Conforte that Judge Claiborne had solicited and accepted bribes from him. Based on Conforte's statements, the Strike Force, the F.B.I., and the Internal Revenue Service commenced still another investigation of Judge Claiborne. Conforte was the long-time owner of the Mustang Ranch brothel in Storey County, Nevada, a former client of Judge Claiborne's and a fugitive from justice. Conforte had been sentenced to 20 years in prison after being convicted of four counts of failing to withhold federal income taxes from the salaries of certain of his employees. According to newspaper articles contained in the court record, Conforte's first charge against Claiborne was that he had bribed him in connection with the Judge's adjudication of certain post-trial motions in Conforte's criminal case. That charge apparently collapsed when it was determined that Judge Claiborne had never presided over or ruled on any aspect of Conforte's case, and that the motions had been decided by a district judge from California prior to Judge Claiborne's appointment to the bench.

Undiscouraged, the government began pursuing two other claims by Conforte that he had bribed the Judge. One of these bribery charge related to Judge Claiborne's treatment of certain subpoenas issued to employees of Conforte in a voting fraud investigation. The other involved a bribe supposedly paid to the Judge so that he would secure a favorable outcome in Conforte's appeal from his tax conviction; at the time of this alleged bribe the appeal was pending before a panel of this court. We ultimately affirmed Conforte's conviction, but remanded for resentencing on three of the counts. *United States* v. *Conforte*, 624 F.2d 869 (9th Cir.1980). The Supreme Court denied a writ cf certiorari, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980), and shortly afterwards Conforte fled to Brazil.

The District Director of the Internal Revenue Service in Reno, Nevada, who was fully familiar with Conforte's background and record, opposed the investigation of Judge Claiborne, because it was based almost exclusively on Conforte's statements. In early 1982, the F.B.I. and the Internal Revenue Service launched a "sting" operation involving an attempt to bribe the District Director. In late 1982, after the plan to "bribe" him had failed, the District Director was transferred to another office. A Treasury Department investigator later condemned the F.B.I.-I.R.S. sting operation as "very dangerous, misleading and poor work."

Beginning in September 1982, the F.B.I. and the Department of Justice presented their case against Judge Claiborne to a grand jury in Portland, Oregon. Conforte did not testify because he was still a fugitive from justice. The grand jury failed to return an indictment.

The government's allegations were presented to a second grand jury in Portland beginning in early 1983. Conforte remained a fugitive. The grand jury once again failed to return an indictment.

Meanwhile, Conforte had been attempting for some time to negotiate a deal with the government. In late 1983 an agreement was reached under which Conforte would return from Brazil and be resentenced to four concurrent terms of five years each, 15 months of which were to be actually served in prison, while the remainder would be suspended. In addition, the government agreed to drop federal bail-jumping charges and persuade Nevada state officials to drop certain state charges against Conforte, as well as convince state prosecutors to agree to concurrent sentences on all remaining state charges.

Conforte returned to this country on December 4, 1983. In the meantime the government had presented his charges against Judge Claiborne to still another grand jury. This time, however, the government did not proceed in Portland, but chose Reno, Nevada as its forum. Conforte testified before the Reno grand jury three days after his return. The following day the grand jury returned a seven count indictment against the Judge.

One week after Judge Claiborne's indictment, Conforte was resentenced by Judge John Lewis Smith of the United States District Court for the District of Columbia. Conforte's case had been transferred to Judge Smith in October 1982 by order of the

Chief Justice of the United States after the District Judge in Nevada who had previously presided over the case recused himself. The reduction in Conforte's sentence may well have violated. Fed.R.Crim.P. 35, *see United States v. Hetrick*, 644 F.2d 752 (9th Cir.1980); *United States v. Pollack*, 655 F.2d 243 (D.C.Cir.1980), as well as 18 U.S.C. § 3651 (1982), not to mention the Justice Department's policy on tardy motions to reduce sentences.

Senior United States District Judge Walter E. Hoffman, of the Eastern District of Virginia, was specially designated by the Chief Justice to preside over Judge Claiborne's trial. In early 1984, Judge Hoffman denied a series of pretrial motions filed by Claiborne. (Previously, Judge Hoffman had been specially designated by the Chief Justice to preside over the Portland and Reno grand jury investigations. These designations, like the trial designation, were made following a request by the Chief Judge of this circuit that an out-of-circuit district judge be appointed.) An appeal to this court followed.

At the time of the pre-trial appeal, the case against Judge Claiborne still included the charges relating to his alleged acceptance of a bribe intended to influence the results in an appeal before one of our panels. We as a court agreed, although in a rather informal manner, to recuse ourselves from hearing Judge Claiborne's pretrial appeal. The Chief Justice then specially selected a panel of three judges from other circuits to hear it. The special panel affirmed the pretrial rulings of the specially assigned district judge. 727 F.2d 842, *cert. denied*, — U.S. —, 105 S.Ct. 113, 83 L.Ed.2d 56 (1984).

The trial then proceeded, with Joseph Conforte as a key government witness. Despite, or perhaps because of, Conforte's testimony the jury could not agree on a verdict on any of the counts.

Because the government abandoned the bribery charges prior to the second trial, Conforte did not testify the next time the prosecution sought to convict Judge Claiborne. Judge Hoffman once again presided over the trial. After the jury returned a guilty verdict on the tax charges, Judge Claiborne again appealed. This time we took no action to recuse ourselves. In fact, we did nothing at all. Although the bribery charges that indirectly involved our court in the proceedings were no longer a part of the case, we simply failed to consider, formally or informally, the question whether we now had an obligation to hear the appeal or whether a new special panel should be appointed. Apparently acting on the assumption that our prior recusal was a continuing one, the Chief Justice specially selected another panel of three judges from other circuits to hear the appeal.

## II

## ANALYSIS

It is clear to me that there was no reason in fact or law why a panel of judges of this court could not have heard Judge Claiborne's post-conviction appeal. The bribery charges had been dropped; the tax charges were unrelated to any alleged bribe and they in no way involved any member of this court. Moreover, our subsequent actions, specifically our en banc vote, show quite plainly that the overwhelming majority of the judges of our court believed that they were not required to recuse themselves from voting on a critical aspect of the proceedings on appeal. Our vote on the en banc call reveals that 19 members of this court, out of a then total of 25, concluded that it was proper for them to vote on the question whether or not Judge Claiborne's appeal should be given en banc consideration. Only six thought they were required to recuse themselves from participating in that decision. Because in my view there can be no distinction drawn between the propriety of a judge's voting on a call for a hearing en banc and the propriety of a judge's hearing the appeal itself, I believe that any three of the 19 judges of our court who voted on the en banc call could properly have heard the post-conviction appeal. Thus, in actuality, there was no need for the appointment of any out-of-circuit judges.

In my view, it is clear that we as a court committed a serious error in our handling of this case, an error with serious consequences. Specifically, we erred when we failed to consider whether we should hear Judge Claiborne's appeal from his conviction or whether, instead, the appointment of a second special panel was required. Because of our error, outside judges were appointed to hear an appeal that we had an obligation to hear ourselves. Our court system is structured so that a defendant will normally have his trial and any appeals heard by judges residing in the circuit in which the charged crime was allegedly committed. Here, we erroneously, albeit inadvertently, deprived Judge Claiborne of this feature of our laws; en banc consideration of the Judge's case would have been a proper means of at least partially remedying our mistake.

Rehearings en banc provide a means for ensuring that the law of our circuit is applied not only consistently but correctly. Here, as a result of our failure to act, judges from other circuits, not as familiar as we are with the precedents of our court, considered a case that we had a duty to hear.[2] Judge Caliborne's appeal raises several issues of importance.[3] In disposing of at least one of those issues, the special outside panel cited no authority from any appellate court, let alone a decision by the judges of this court. The special panel also stated that it was not following the result reached in two of the three district court opinions that it cited. 765 F.2d at 794-95. In my view, when a substantial question of law not previously decided by the judges of this court is decided by a panel of outside judges and we subsequently recognize that we have erred in failing to decide that question ourselves, it is our responsibility to grant en banc reconsideration. Moreover, in this case there are additional reasons why we should have granted an en banc hearing. *See infra* at pp. 1332-33.

Some of the members of this court who voted against an en banc hearing may have believed that an appearance of impropriety would arise if we were to review the conviction of a district judge who sits within the geographical boundaries of the Ninth Circuit; they may have thought that a decision to hear Judge Caliborne's case en banc would be ill-advised since it might cause some to think less well of our court, or of courts in general. I respectfully suggest that a vote influenced by such institutional concerns would unfairly prejudice Judge Caliborne's rights and contravene basic principles governing the law of recusal.

Courts must always strive to administer justice in a manner such that there is no appearance of either impropriety or injustice. At the same time, a court must never deprive a person of his right to just treatment or the opportunity to avail himself of the full procedural rights or protections to which he is entitled. Certainly it must not do so merely because a judge believes that it may appear to some persons that in affording an individual those rights the court has acted improperly. Our highest duty at all times is to provide justice to all litigants; no other principle is as important.

Normally, there is no conflict between our duty as individual judges to appear impartial and our obligation to afford justice to all. In those cases in which there is a conflict, there is usually some method of ensuring that both goals can be accomplished within the normal procedures governing the operation of the judicial system. For example, a trial judge faced with such a conflict can recuse himself, and another trial judge can be substituted. So, too, a circuit judge can, normally, readily be replaced by another circuit judge or even by a district judge. There are, however, a few cases in which there is no mechanism for resolving the conflict in a manner that allows the court to honor both obligations fully. In such cases the obligation to do justice prevails and the "rule of necessity" applies. Under that rule, the court must hear the case and do justice even though an appearance of interest or impropriety may exist. *See United States* v. *Will*, 449 U.S. 200, 213-17, 101 S.Ct. 471, 480-82, 66 L.Ed.2d 392 (1981).

The fact that Harry Claiborne is a United States District Judge does not mean that he is less entitled than any other individual to the full benefit of the orderly procedures of this court. Those procedures, including en banc consideration, have been established to ensure that justice is done. Our en banc process is also designed, as I noted earlier, to ensure that the law of this circuit will be applied uniformly to all defendants. Judge Claiborne has just as much right to have his case considered en banc as any other defendant. En banc proceedings are different in one critical respect, however, from all other proceedings this court conducts: only the judges of our court can hear a case of ours en banc. There is no procedure in current law for obtaining an out-of-circuit en banc panel. This is true even when an appeal is heard initially by a specially selected panel of out-of-circuit judges. Thus, if in fact an appearance of impropriety existed here, the rule of necessity would apply, and we would be required to disregard that appearance. Accordingly, if a factor in our decision to deny Judge Claiborne en banc consideration of his case was our concern over an appearance of impropriety, we have, in my view, seriously misconstrued our duty as judges of this circuit. In doing so, we have, unfortunately, also denied Judge Claiborne equal justice.

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[2] While circuit judges from other circuits and district judges sit on Ninth Circuit panels, title 28 requires that at least two of the judges on any panel be judges of this court. 28 U.S.C. § 46(b)(1982). *See also* Ninth Circuit General Order 3.2(a) (same).

[3] *See* Judge Ferguson's companion dissent for a discussion of two of those issues.

Moreover, had we agreed to rehear Judge Claiborne's case en banc, there would have been neither any actual impropriety nor any appearance of impropriety in our doing so. In my opinion, the public has the identical perception of a court of appeals' reviewing a district judge's conviction whether the appellate judges come from the same geographic area as the district judge or not. To most people the appearance would be similar whether the appellate judges were from the Ninth Circuit, or from the Second, Seventh or Tenth Circuits. If there were any appearance of impropriety in our hearing Judge Claiborne's case, it would stem from the fact that we are all judges together, all members of the "judicial fraternity", not from the happenstance of our physicial locations.[4] Yet, no one has suggested that the special panel of circuit judges did not act in a proper and impartial manner, or that an appearance of impropriety exists because that panel might have favored Judge Claiborne. I believe the public is sophisticated enough to accept the fact that if a judge is to be tried, he will be tried before colleagues who are members of the same profession and that those colleagues may in some cases even reside in the same section of our nation. In short, I do not believe that reasonable persons would have had cause to think that any impropriety might have existed had we, as a court, simply followed our regular procedures and heard Judge Claiborne's post-conviction appeal in the normal course.

There *is*, however, an appearance of impropriety or injustice in this case—one that I fear a majority of my colleagues may fail to recognize. That "appearance" does not militate against affording Judge Claiborne en banc consideration; rather, it strongly militates in favor of granting him a hearing. Our refusal to do so allows the record to rest with the appearance that Judge Claiborne may have been the object of *adverse* special treatment and, thus, the victim of injustice. Judge Claiborne is one of the few criminal defendants in the Ninth Circuit, if not in the nation, whose case has been handled, both in the District Court and in the Court of Appeals, exclusively by judges specially and specifically chosen to hear that particular case.[5] There is, in my opinion, a rather substantial appearance of injustice when a defendant who claims he is the victim of a vendetta on the part of various branches and agencies of the Department of Justice is deprived of the opportunity to be judged by those who would normally preside over his case and instead is tried and convicted before, and has his appeal heard by, judges all of whom are specially selected for their assignments.

There is no doubt that every step taken in appointing the specially designated judges fully complied with all existing statutes and rules. Moreover, there is no suggestion in this case that there was in fact anything improper about the designation of the judges, or that any of the judges involved in the selection process acted with anything less than the utmost integrity. Nevertheless, in a case in which the defendant contends that he is the object of a prosecutorial vendetta, in which the judges who heard the case were all specially selected under a process that permits the selector total discretion to choose whom he wishes, and in which we as a court erred in permitting the specially selected panel to hear the appeal, I believe that an en banc hearing is required—if for no other reason than to ameliorate, to the extent possible, the appearance of injustice. En banc consideration by the judges of this court, judges who were not specifically selected to hear Judge Claiborne's appeal, would have gone a considerable way towards accomplishing that objective.

Unfortunately, as events unfolded, only an en banc review by this court or a hearing by the United States Supreme Court could have afforded Judge Claiborne consideration of his case by a tribunal that had all the appearances of fairness. All courts that have previously heard his case are open to the charge that they were specially selected for the purpose of ensuring the desired governmental objective. In my opinion, the proceedings thus far afforded Judge Claiborne fall far short of meeting the "appearance of justice" standard. Because of our obligation to administer justice in a manner that maintains confidence in the fairness and objectivity of the judicial system, I believe that it was our duty and responsibility to hear his case en banc.

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[4] Of course, if an individual judge has a particular personal or professional relationship with the defendant, individual recusal may be required.

[5] There are no available statistics regarding the number of cases in which a similar designation of both out-of-circuit district and circuit judges has been made. Informal research makes it clear, however, that the procedure is invoked infrequently.

## III

## THE RULES

As mentioned above, every step taken in this case to appoint the various special judges was taken according to existing and duly promulgated rules. However, in my opinion, we should seriously, and quickly, re-evaluate those rules. Under 28 U.S.C. §§ 291 & 292, the Chief Justice of the Supreme Court must designate and assign a circuit or district judge to act as a circuit or district judge in another circuit upon receipt of a "certificate of necessity" from the chief judge of the circuit to which the judge will be assigned. The Chief Justice may select any judge he wishes; there are no published guidelines or standards. Thus, when a certificate of necessity is issued in a specific case or proceeding, there will always by an appearance that the judges designated are being hand-picked to decide the controversy.

This appearance is particularly strong in criminal cases. In my view, the current rules should be modified so that any out-of-circuit judges designated to hear specific criminal cases are selected by a random selection system through procedures that are a matter of public record.

There are various alternatives to the present system that might be considered. For example, the chief judge of each circuit could designate a number of judges who are available for such special assignments. Then, the Chief Justice could select the needed judges in a random drawing from the pool. Alternatively, a case in which all the judges of a circuit are recused could be assigned to another randomly chosen circuit. The trial judge could be selected according to any random selection procedure used in that circuit. Any appeals could be considered by panels from that circuit selected in the ordinary course. Any petition for a rehearing en banc could then be dealt with by the judges of that circuit in the regular fashion. Numerous other methods of ensuring the appearance of fairness and objectivity in the selection process could certainly be devised.

Of course, problems similar to those discussed above can arise when a chief judge of a circuit designates and assigns a district judge to hold court in another district of that circuit pursuant to 28 U.S.C. § 292(b). A random selection system could also be devised for use by the chief judge of a circuit when he is required to make such a designation and assignment for purposes of a specific criminal case.[6]

## IV

## CONCLUSION

For the reasons set forth above, I respectfully dissent from the court's denial of an en banc hearing.[7]

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United States

v.

Claiborne

No. 84-1294.

United States Court of Appeals, Ninth Circuit

Feb. 10, 1986

As Amended March 4, 1986

PREGERSON, Circuit Judge, dissenting from the order denying hearing en banc:

Judges Ferguson and Reinhardt in their dissents raise a number of serious questions calling for en banc consideration. I voted to grant the en banc petition and feel constrained to dissent from our court's refusal to do so.

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[6] In our circuit, intracircuit assignments of district judges are governed by guidelines, promulgated by the Judicial Council of the Circuit, that prescribe a regular, objective method for selecting judges to be designated to perform services in another district.

[7] I, of course, express no opinion as to the outcome were we to consider Judge Claiborne's appeal en banc. For present purposes I need conclude only that en banc consideration is required.

**Mr. KASTENMEIER.** I would ask the clerk how much time I have remaining to me?

**Mr. EDWARDS.** The gentleman from Wisconsin has three minutes remaining.

**Mr. KASTENMEIER.** Mr. Chairman, I give myself such time as I may consume.

On the latter point, I would advise members they have before them a list of the documents relating to *U.S.* v. *Claiborne,* 85 individual orders, indictments, appeals, motions, all of which in total, suggest, as has been suggested before, that this particular individual availed himself, as he is entitled to, procedurally and constitutionally, of all possible motions, of the legal process to defend himself.

It could be said, for example, there was a first trial. We did not bring in matters of the first trial, and there may have been dissent, dissenting judges in the process. But we did narrow the scope of inquiry and are absolutely satisfied. The fact that there may have been a dissenting opinion is not really relevant to the matter at hand, and I would hope we can go forward.

One concluding comment should be made at some point, if not now. While we are today proceeding, as we must, against Judge Claiborne, it must be pointed out the Federal Judiciary consists at large of highly reputable members who have rendered good service. This is one of the reasons for Article IV—because there are ethics that are adhered to. That is why we insist on Article IV, some of us, so that the reputation of the Judiciary, which has been injured in this case, be upheld.

My time has expired, Mr. Chairman.

The **CHAIRMAN** [presiding]. The time for general debate has expired, and the clerk will read subcommittee amendment number one.

**Mr. CLINE.** Resolved that Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, be impeached for misbehavior, and for high crimes and misdemeanors; and that the evidence heretofore taken by a subcommittee of the Committee on the Judiciary of the House of Representatives sustains articles of impeachment, which are hereinafter set out; and that the articles be adopted by the House of Representatives and exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Judge Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, in maintenance and support of its impeachment against him for misbehavior and for high crimes and misdemeanors.

The **CHAIRMAN.** The gentleman from Wisconsin, Mr. Kastenmeier, and the gentleman from California, Mr. Moorhead, will be recognized for 15 minutes each.

**Mr. MORRISON.** Parliamentary inquiry, Mr. Chairman.

The **CHAIRMAN.** The gentleman will state it.

**Mr. MORRISON.** Do I understand correctly we will be voting separately on this as the introductory language, and then on each of the four articles separately?

The **Chairman**. Each of the four articles will be voted on separately.

Mr. **Morrison**. Thank you, Mr. Chairman.

The **Chairman**. Then there will be a final vote on the resolution, as amended.

The gentleman from Wisconsin is recognized.

Mr. **Kastenmeier**. Mr. Chairman, I will not take but just one or two minutes. What we are adopting here is a resolve clause. As originally introduced, of course, the resolution states a rather naked proposition. The resolve clause is a perfection of the original resolution, as presented to us. It does not in and of itself contain any of the four articles but states the proposition in stark terms under which the four articles are relevant.

It was not controversial. I know of no controversy attending it. It was written as a result of the traditional resolve clauses of the past being consulted with reference to the proper form which a resolution of impeachment should take. This has what we believe to be the necessary components of such a resolve and consequently, I offer it to the committee and trust there are no controversies attending it. I reserve the balance of my time.

The **Chairman**. The gentleman from California, Mr. Moorhead.

Mr. **Moorhead**. Mr. Chairman, I am satisfied with the resolve clause. I will have a couple of small, technical changes that make no difference in the meaning of this technical clause that I will put in at the end of the bill. But we are satisifed with the statement in the resolve clause.

The **Chairman**. The gentleman from Wisconsin yields back the balance of his time?

Mr. **Kastenmeier**. Consulting with my colleagues, I have no request for time.

The gentleman from Wisconsin yields back the balance of his time.

The **Chairman**. The gentleman from California.

Mr. **Moorhead**. I have no request for time, Mr. Chairman.

The **Chairman**. The question then occurs on the subcommittee amendment No. 1.

All those in favor of the adoption of subcommittee amendment No. 1, please say aye.

All those opposed.

The ayes have it and subcommittee amendment number one is adopted.

The Clerk will read subcommittee amendment number two.

Mr. **Cline**. Article I. That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1980, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1979, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $80,277.04 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of Section 7206(1) title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a 12-person jury in the United States District Court for the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

The **CHAIRMAN**. The gentleman from Wisconsin and the gentleman from California will be recognized for 15 minutes each.

The gentleman from Wisconsin.

Mr. **KASTENMEIER**. Mr. Chairman, Article I, as Article II, not only is based on the count as voted on by the jury itself, of which the Judge was found guilty, but it has its origins in the original indictment. It is the fact count and is, other than distinguishing the year of the tax violation, the same as Article II, the same basis is present. In the subcommittee, to make it more explicit as to which facts we believe to be proven by this article, we adopted the amendments of the gentleman from Connecticut, Mr. Morrison, to Article I and Article II stating that the facts set forth were found beyond a reasonable doubt by a 12-person jury in the United States District Court for the District of Nevada.

That is the only change we made. There is no other controversy about this particular article that I am aware of, Mr. Chairman.

I reserve my time.

The **CHAIRMAN**. The gentleman from California.

Mr. **MOORHEAD**. Thank you, Mr. Chairman.

Articles I and II, as amended by Mr. Morrison, set out the facts underlying Judge Claiborne's trial on two counts of tax evasion, Article I for 1979 and Article II for 1980. These two articles do not rest upon the conviction, but rather on the facts and information contained in the trial record and if for some reason the conviction as it now stands were to be thrown out, let's say, on a technicality in a collateral attack, the House could still proceed to a trial in the Senate based on the facts and information that were developed during the trial and accepted as true beyond a resonable doubt by a jury of the judge's peers.

There is no way to know at this stage what the Senate, sitting as a jury, will require the manager of the articles to prove.

I would hope that the Senate would keep it very limited and accept the fact of conviction as prima facie evidence of an impeachable offense, but if they request a showing of proof to support the facts, then our managers can proceed under Articles I and II to so prove.

The **CHAIRMAN**. The gentleman from Wisconsin.

Mr. **KASTENMEIER**. I yield so much time as he may require to the gentleman from Connecticut, Mr. Morrison.

The **CHAIRMAN**. The gentleman from Connecticut is recognized.

Mr. **MORRISON**. I thank the gentleman for yielding and I will be very brief.

As I said in my opening statement, it is, I think, important to understand the purpose of the Articles I and II. We are relying in our process on the record and ultimately the conclusion of the jury that Judge Caliborne did these acts and that this finding is entitled to conclusive weight in the Senate.

Now, the gentleman from Massachusetts has suggested, that in some other case, there could be circumstances under which the jury verdict might be impeached. But the fact is, in this case, having given an opportunity to the judge and his attorney to make any showing, the showings don't go to the factual finding of the jury. I think we are stating with confidence that this is a case in which the jury verdict is unimpeached and indeed unimpeachable, and that we are proceeding on that verdict.

That is why we have Article III. But there might be circumstance in which the judgment of the court, as distinct from the jury verdict, would be overturned and if that were to happen, we believe that Articles I and II provide a sufficient basis for relying upon the fact finding of the jury. I think that is an important statement of principle that we are making in the way we framed this article, and that is that we believe in the jury system. We believe in the validity of jury verdicts. We do not believe the Senate must re-try the facts in a case in which a legitimately constructed and unimpeached jury in the Federal court has rendered a judgment on the facts. A verdict beyond a reasonable doubt, which, in fact, is a higher standard than a two-thirds vote in the Senate, a unanimous verdict beyond a reasonable doubt, ought certainly to be enough to command that two-thirds vote in the Senate. That, in fact, is the theory, I believe, behind what we have done.

Mr. KASTENMEIER. I reserve the balance of my time.

The CHAIRMAN. The gentleman from Wisconsin.

Mr. KASTENMEIER. There being no further request on this side, I yield back the balance of my time.

The CHAIRMAN. The gentleman from California.

Mr. MOORHEAD. I yield back the balance of my time.

The CHAIRMAN. The question occurs——

Mr. KASTENMEIER. Mr. Chairman, this being an article of impeachment, I would request a recorded vote.

The CHAIRMAN. The gentleman requests a recorded vote and the clerk will call the roll. Those in favor of the adoption of subcommittee amendment number two will vote aye. Those opposed, vote no. The Clerk will call the roll.

Mr. CLINE. Mr. Brooks.

Mr. KASTENMEIER. By proxy votes aye.

Mr. CLINE. Mr. Kastenmeier.

Mr. KASTENMEIER. Aye.

Mr. CLINE. Mr. Edwards.

Mr. EDWARDS. Aye.

Mr. CLINE. Mr. Conyers.

Mr. EDWARDS. Aye by proxy.

Mr. CLINE. Mr. Seiberling.

The CHAIRMAN. Proxy, aye.

Mr. CLINE. Mr. Mazzoli.

Mr. MAZZOLI. Aye.

Mr. CLINE. Mr. Hughes.

Mr. HUGHES. Aye.
Mr. CLINE. Mr. Synar.
Mr. KASTENMEIER. By proxy, Mr. Synar votes aye.
Mr. CLINE. Mrs. Schroeder.
Mrs. SCHROEDER. Aye.
Mr. CLINE. Mr. Glickman.
The CHAIRMAN. Proxy, aye.
Mr. CLINE. Mr. Frank.
Mr. FRANK. Aye.
Mr. CLINE. Mr. Crockett.
The CHAIRMAN. Proxy, aye.
Mr. CLINE. Mr. Schumer.
Mr. SCHUMER. Aye.
Mr. CLINE. Mr. Morrison.
Mr. MORRISON. Aye.
Mr. CLINE. Mr. Feighan.
[No response.]
Mr. CLINE. Mr. Smith.
The CHAIRMAN. Proxy, aye.
Mr. CLINE. Mr. Berman.
The CHAIRMAN. Proxy, aye.
Mr. CLINE. Mr. Boucher.
The CHAIRMAN. Proxy, aye.
Mr. CLINE. Mr. Staggers.
The CHAIRMAN. Proxy, aye.
Mr. CLINE. Mr. Bryant.
The CHAIRMAN. Proxy, aye.
Mr. CLINE. Mr. Fish.
Mr. FISH. Aye.
Mr. CLINE. Mr. Moorhead.
Mr. MOORHEAD. Aye.
Mr. CLINE. Mr. Hyde.
Mr. HYDE. Aye.
Mr. CLINE. Mr. Kindness.
Mr. KINDNESS. Aye.
Mr. CLINE. Mr. Lungren.
Mr. LUNGREN. Aye.
Mr. CLINE. Mr. Sensenbrenner.
Mr. SENSENBRENNER. Aye.
Mr. CLINE. Mr. McCollum.
Mr. MCCOLLUM. Aye.
Mr. CLINE. Mr. Shaw.
Mr. SHAW. Aye.
Mr. CLINE. Mr. Gekas.
Mr. MOORHEAD. Aye by proxy.
Mr. CLINE. Mr. DeWine.
Mr. DEWINE. Aye.
Mr. CLINE. Mr. Dannemeyer.
Mr. MOORHEAD. Aye by proxy.
Mr. CLINE. Mr. Brown.
Mr. MOORHEAD. Aye by proxy.
Mr. CLINE. Mr. Swindall.
Mr. SWINDALL. Aye.
Mr. CLINE. Mr. Coble.

Mr. COBLE. Aye.

Mr. CLINE. Mr. Rodino.

The CHAIRMAN. Aye.

Mr. CONYERS. Mr. Chairman, how am I recorded?

Mr. CLINE. Mr. Conyers is recorded aye by proxy.

Mr. CONYERS. Aye.

The CHAIRMAN. The Clerk will report.

Mr. CLINE. Mr. Chairman, 34 members have voted aye. One member was absent.

The CHAIRMAN. The subcommittee amendment is agreed to.

The Clerk will read subcommittee amendment number three.

Mr. CLINE. That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1981, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1980, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $54,251 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Wherefore, the said Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

The CHAIRMAN. The gentleman from Wisconsin, Mr. Kastenmeier, and the gentleman from California, Mr. Moorhead, will be recognized for 15 minutes each. The gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Chairman, this article, as has been stated before, is virtually identical, certainly in theory, with Article I. The only difference is it does become a separate article because we have elected to follow the counts on which the determinations of fact were made by the jury.

And so rather than merging these, we have continued to report them, as the counts were themselves, as separate items. So Article II refers to 1980, as Article I refers to 1979. This also contains the same amendment that was referred to before. I know of no controversy with respect to Article II.

I reserve the balance of my time, Mr. Chairman.

The CHAIRMAN. The gentleman from California.

Mr. MOORHEAD. Mr. Chairman, as stated by the Chairman of the Subcommittee, Article II, as we have here, refers to the tax return of 1980, and the facts leading to the conviction of filing that false return. The arguments that are given for this article are the same as with the first article.

It is a conviction of the second count that we have which actually was the sixth count in the indictment. I think the facts clearly show that Judge Claiborne is guilty of this particular count and I support a positive vote on this item.

The **Chairman**. The gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, I have no further request for time.

I yield back the balance of my time.

Mr. **Moorhead**. I have no further request for time, Mr. Chairman.

The **Chairman**. The time has expired. The question occurs on subcommittee amendment number three.

Mr. **Kastenmeier**. Mr. Chairman, I ask for a recorded vote.

The **Chairman**. A recorded vote is requested and the Clerk will call the roll. Those in favor of the subcommittee amendment will vote aye. Those opposed will vote no.

The Clerk will call the roll.

Mr. **Cline**. Mr. Brooks.

Mr. **Brooks**. Aye.

Mr. **Cline**. Mr. Kastenmeier.

Mr. **Kastenmeier**. Aye.

Mr. **Cline**. Mr. Edwards.

Mr. **Edwards**. Aye.

Mr. **Cline**. Mr. Conyers.

Mr. **Kastenmeier**. Votes aye by proxy.

Mr. **Cline**. Mr. Seiberling.

The **Chairman**. Proxy, aye.

Mr. **Cline**. Mr. Mazzoli.

Mr. **Mazzoli**. Aye.

Mr. **Cline**. Mr. Hughes.

Mr. **Hughes**. Aye.

Mr. **Cline**. Mr. Synar.

Mr. **Kastenmeier**. Votes aye by proxy.

Mr. **Cline**. Mrs. Schroeder.

Mrs. **Schroeder**. Aye.

Mr. **Cline**. Mr. Glickman.

The **Chairman**. Proxy, aye.

Mr. **Cline**. Mr. Frank.

Mr. **Frank**. Aye.

Mr. **Cline**. Mr. Crockett.

The **Chairman**. Proxy, aye.

Mr. **Cline**. Mr. Schumer.

Mr. **Schumer**. Aye.

Mr. **Cline**. Mr. Morrison.

Mr. **Morrison**. Aye.

Mr. **Cline**. Mr. Feighan.

[No response.]

Mr. **Cline**. Mr. Smith.

The **Chairman**. Proxy, aye.

Mr. **Cline**. Mr. Berman.

The **Chairman**. Proxy, aye.

Mr. **Cline**. Mr. Boucher.

The CHAIRMAN. Proxy, aye.

Mr. CLINE. Mr. Staggers.

The CHAIRMAN. Proxy, aye.

Mr. CLINE. Mr. Bryant.

The CHAIRMAN. Proxy, aye.

Mr. CLINE. Mr. Fish.

Mr. FISH. Aye.

Mr. CLINE. Mr. Moorhead.

Mr. MOORHEAD. Aye.

Mr. CLINE. Mr. Hyde.

Mr. HYDE. Aye.

Mr. CLINE. Mr. Kindness.

Mr. KINDNESS. Aye.

Mr. CLINE. Mr. Lungren.

Mr. LUNGREN. Aye.

Mr. CLINE. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Aye.

Mr. CLINE. Mr. McCollum.

Mr. MCCOLLUM. Aye.

Mr. CLINE. Mr. Shaw.

Mr. SHAW. Aye.

Mr. CLINE. Mr. Gekas.

Mr. MOORHEAD. Proxy, aye.

Mr. CLINE. Mr. DeWine.

Mr. DEWINE. Aye.

Mr. CLINE. Mr. Dannemeyer.

Mr. MOORHEAD. Proxy, aye.

Mr. CLINE. Mr. Brown.

Mr. MOORHEAD. Proxy, aye.

Mr. CLINE. Mr. Swindall.

Mr. SWINDALL. Aye.

Mr. CLINE. Mr. Coble.

Mr. COBLE. Aye.

Mr. CLINE. Mr. Rodino.

The CHAIRMAN. Aye.

Clerk will report.

Mr. CLINE. Mr. Chairman, 34 members voted aye; one member was absent.

The CHAIRMAN. The amendment is agreed to.

The Clerk will read subcommittee amendment number four.

Mr. CLINE. That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes in office in a manner and form as follows:

On August 10, 1984, in the United States District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing to a false income tax return for the calendar years 1979 and 1980 in violation of Section 7206(1) of title 26, United States Code.

Thereafter, a judgment of conviction was entered against Judge Harry E. Claiborne for each of the violations of Section 7206(1) of title 26, United States Code, and a sentence of two years imprisonment for each violation was imposed, to be served concurrently, together with a fine of $5,000 for each violation.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of high crimes.

The **Chairman**. The gentleman from Wisconsin, Mr. Kastenmeier, and the gentleman from California, Mr. Moorhead, will be recognized for 15 minutes each.

The gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, the third article just read as amendment four—it is the third article—is a conviction count alleging that on August 10, 1984, Judge Claiborne was found guilty without dissent by a 12-person jury of his peers for the making and filing of false Federal income tax forms for the years 1979 and 1980; that, in fact, his conviction standing alone, would be sufficient to sustain an impeachment resolution. That is the essence of the article. The article was not the subject of any controversy in the subcommittee.

I believe it is clear, simple, well understood, and important to this process.

Mr. Chairman, I reserve the balance of my time.

The **Chairman**. The gentleman from California.

Mr. **Moorhead**. Mr. Chairman, Article III rests entirely on the conviction itself and stands for the proposition that when a Federal judge is convicted of a felony and has refused to vacate his office, he has misbehaved in office and by conviction alone, he is guilty of having committed "high crimes" in office as that term is set out in the United States Constitution.

The "wherefore" clause in Article III speaks only of high crimes and not of misdemeanors.

Mr. Chairman, I think this article will set a very important precedent—conviction by itself with nothing more is an impeachment offense and is ground for conviction in the Senate and removal from office.

The **Chairman**. Any further request for time?

Mr. **Kastenmeier**. I yield back the balance of my time, Mr. Chairman.

Mr. **Moorhead**. I yield back the balance of my time, Mr. Chairman.

The **Chairman**. The question occurs——

Mr. **Kastenmeier**. Mr. Chairman.

The **Chairman** [continuing]. On subcommittee amendment number four.

Mr. **Kastenmeier**. Mr. Chairman, on that I ask for a roll call.

The **Chairman**. A roll call vote is requested.

The clerk will call the roll.

All those in favor, vote aye; those opposed no.

The Clerk will call the roll.

Mr. **Cline**. Mr. Brooks.

Mr. **Brooks**. Aye.

Mr. **Cline**. Mr. Kastenmeier.

Mr. **Kastenmeier**. Aye.

Mr. **Cline**. Mr. Edwards.

Mr. **Edwards**. Aye.

Mr. **Cline**. Mr. Conyers.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Seiberling.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Mazzoli.

Mr. Mazzoli. Aye.

Mr. Cline. Mr. Hughes.

Mr. Hughes. Aye.

Mr. Cline. Mr. Synar.

The Chairman. Proxy—I withdraw that. The clerk will withdraw that.

Mr. Kastenmeier. Mr. Synar votes aye by proxy, Mr. Chairman.

Mr. Cline. Mrs. Schroeder.

Mrs. Schroeder. Aye.

Mr. Cline. Mr. Glickman.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Frank.

Mr. Frank. Aye.

Mr. Cline. Mr. Crockett.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Schumer.

Mr. Schumer. Aye.

Mr. Cline. Mr. Morrison.

Mr. Morrison. Aye.

Mr. Cline. Mr. Feighan.

[No response.]

Mr. Cline. Mr. Smith.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Berman.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Boucher.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Staggers.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Bryant.

The Chairman. Proxy, aye.

Mr. Cline. Mr. Fish.

Mr. Fish. Aye.

Mr. Cline. Mr. Moorhead.

Mr. Moorhead. Aye.

Mr. Cline. Mr. Hyde.

Mr. Hyde. Aye.

Mr. Cline. Kindness.

Mr. Kindness. Aye.

Mr. Cline. Mr. Lungren.

Mr. Lungren. Aye.

Mr. Cline. Mr. Sensenbrenner.

Mr. Sensenbrenner. Aye.

Mr. Cline. Mr. McCollum.

Mr. McCollum. Aye.

Mr. Cline. Mr. Shaw.

Mr. Moorhead. Proxy, aye.

Mr. Cline. Mr. Gekas.

Mr. Moorhead. Proxy, aye.

Mr. Cline. Mr. DeWine.

Mr. DeWine. Aye.

Mr. Cline. Mr. Dannemeyer.

Mr. Moorhead. Proxy, aye.

Mr. Cline. Mr. Brown.

Mr. Brown. Aye.

Mr. Cline. Mr. Swindall.

Mr. Swindall. Aye.

Mr. Cline. Mr. Coble.

Mr. Coble. Aye.

Mr. Cline. Mr. Rodino.

The Chairman. Aye.

Mr. Feighan.

Mr. Feighan. How am I recorded?

Mr. Cline. Mr. Feighan is not recorded.

Mr. Feighan. I would be recorded aye.

Mr. Kastenmeier. Would the gentleman yield?

Does not the gentleman from Ohio desire to indicate how he would have voted on Articles I and II, preceding amendments?

Mr. Feighan. Will the gentleman yield?

Yes, I do. I had intended to ask for that after the vote, but I will at this point. I would have voted, had I been here, and I apologize I was absent, "aye" on the previous three questions.

The Chairman. Will the gentleman repeat his request?

The Clerk will report.

Mr. Cline. Mr. Chairman, 35 members have voted "aye", unanimously.

The Chairman. The amendment is agreed to.

The Clerk will read subcommittee amendment number five.

Mr. Cline. That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of misdemeanors in office in a manner and form as follows:

Judge Harry E. Claiborne took an oath for the office of judge of the United States and, by taking the oath, is required to discharge and perform all the duties incumbent on him and to enforce and obey the Constitution and laws of the United States.

Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.

Judge Harry E. Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980, has violated his oath of office and reduced confidence in the integrity and impartiality of the judiciary, thereby bring disrepute on the Federal courts and the administration of justice by the courts.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of misdemeanors and, by such conduct, warrants impeachment and trial and removal from office.

The Chairman. The gentleman from Wisconsin, Mr. Kastenmeier, and the gentleman from California, Mr. Moorhead, are recognized for 15 minutes each.

The gentleman from Wisconsin.

Mr. Kastenmeier. Mr. Chairman, I yield myself five minutes.

The **Chairman**. The gentleman is recognized for five minutes.

Mr. **Kastenmeier**. Mr. Chairman, this article has, in fact, been debated, at least prior to this moment, in the full committee. Nevertheless, I think it is necessary to review what it is and the purpose of it.

The fourth and final article states that Judge Claiborne's actions have brought disrepute on the Federal judiciary. It alleges that the Judge, having taken an oath of office to discharge and perform all duties incumbent upon him to enforce and obey the Constitutional laws of the United States, being required to uphold the integrity and independence of the judiciary, brought disrepute on the Federal courts and the administration of justice.

He did this when he misbehaved in his capacity as Federal judge by willfully falsifying his income on his 1979 and 1980 Federal income tax returns. He has, in fact, therefore, engaged in misbehavior and should be impeached.

Now, Mr. Chairman, this is the only article on which there is some difference. I would make the concession at the outset that this article is not in and of itself necessary alone to impeach Judge Claiborne in the Senate. That is not the sole purpose of this amendment.

It has historical roots even though it would appear to be of lesser nature, that it would appear to be a constitutional misdemeanor and does not involve the conviction as we state it in Article III as a conviction standing alone.

It is necessary, in the view at least of some of us—and if the committee does choose to disregard this, obviously the impeachment can go forward—but it is necessary, in the view of some of us, because it must fully state the case, that there are other elements we should consider, even though they be of lesser consequence and even though it may be seen by some to place a greater burden on those who would be managers for the House in the Senate.

Because we state that not only a conviction in and of itself, not only a finding of the jury as facts, beyond this, the fact that you have brought disrepute on the judiciary; that you have not upheld your oath of office; that you have, in fact, violated the canon of judicial ethics, is, as it has been in the past, a basis for an article of impeachment, even as it was in the 1936 case of Judge Ritter. Even if it is of lesser consequence than it is in this context, a misdemeanor, a matter of misbehavior, I think it is important that the federal courts in this country understand it is not merely conviction alone, even though it is convenient to do so, on which we base this entire proceeding. And so this fourth element, Mr. Chairman, I think is essential for the greater purpose of this impeachment inquiry, this impeachment process.

I withhold the balance of my time, Mr. Chairman.

The **Chairman**. The gentleman from California, Mr. Moorhead.

Mr. **Moorhead**. Mr. Chairman, with Mr. DeWine's amendment, I believe that Article IV is very important and it stands for the proposition that Judge Claiborne's conviction does more than tarnish his personal reputation. His actions have also tarnished the Federal judiciary, which compromises public respect for the confidence in the judiciary as an institution.

There is no doubt that Judge Claiborne can be impeached, convicted and removed from office without this article. But we have to ask ourselves as lawyers and drafters of the law whether this sort of conduct, this sort of apparent disregard for that office, is acceptable, and if it is not, we had better find a way to say so and send a message to all judges that the Congress feels very strongly that our system of dispensing justice must have absolute integrity and that judges must be very careful not to engage in conduct that will in any way diminish respect towards the judiciary as an institution.

The judiciary does not have politicians singing its praises or expensive lobbyists pursuing its causes. When it comes right down to it, the only thing it really has is its integrity and if not guarded, that will become very fragile.

That is what we are really talking about in this article and when it is all over, this article can do more good for the judiciary as an institution than any other article we are considering.

I urge its adoption.

The CHAIRMAN. The gentleman from Wisconsin.

Mr. MORRISON. Would the gentleman yield?

Mr. KASTENMEIER. I yield to the gentleman from Connecticut for three minutes.

The CHAIRMAN. The gentleman from Connecticut is recognized for three minutes.

Mr. MORRISON. I thank the gentleman for yielding.

I seek recognition to speak in opposition to this article. I do so not because this could not be a proper article, but because I believe that in this context it weakens the case overall and it weakens the message that needs to be sent.

Now, special counsel, when he presented Article IV, stated that what it relies upon is the conduct that led to the judgment of the jury and the conviction.

So in each and every article, we are ultimately relying on the same conduct, which was the tax evasion, the falsification of the income tax returns.

That is the heart of this case. That is what it is about. We have already approved two concepts. The first one in Article III is that a person who has been convicted is conclusively determined to have committed that conduct, and having been unable to overturn that conviction, ought to be impeached and removed from office.

We have taken a second position, in Articles I and II, that the facts, having been found beyond a reasonable doubt by a jury, and having not been impeached, there being no evidence that the jury verdict is tainted in any way, ought to be sufficient for removal from office.

Now, the arguments that are being advanced in support of Article IV are really not arguments that add anything to that case. What they say is that this conduct is a disgrace to the Judiciary and is inappropriate. That same argument really lies under Articles I, II, and III.

The conduct—why is the conduct impeachable? Because it is high crimes and misdemeanors, because it meets the constitutional standard for removal from office.

Now, what we have really done in I and II and III is say, how do you meet that burden? You meet it by a conviction or you meet it by the facts.

If we are saying in Article IV that we are taking on the burden of proving the facts in the Senate from start to finish, bringing that whole case forward subject to all that that would involve, I think that would be a terribly bad strategic decision.

We ought not to do that. We could do that, but I hope that we wouldn't. I think we can rely on all of the policy arguments, all of the principles that have been stated in support of Article IV within our case on Articles I, II, III, and we can do it while narrowing the case, while focusing the case.

I understand that the Article IV language has been used in an impeachment of a judge before, but that was when there was no conviction, when there was no other fact-finding.

I fear very much the Senate will see that as a loophole out of which to escape from making the important determination that I hope is going to be made, the determination that conviction is enough, that the judgment of the jury is enough, so that no judge would think—I would ask the gentleman from Wisconsin if he would yield me one additional minute?

Mr. **Kastenmeier**. I yield the gentleman one additional minute.

The **Chairman**. The gentleman is recognized for one additional minute.

Mr. **Morrison**. So no judge will think there is a second bite of the apple up here for a full-blown trial or to undermine the conviction once it has been entered. And he certainly has the right to pursue his remedies in the courts and to challenge the conviction, but we don't want to invite challenges in the Senate and long, drawn-out trials in the case of a conviction.

Let me just say beyond that, to the extent that this article says that maybe he was convicted wrongfully, maybe the jury made a mistake and even if all of that is true, he has done something wrong. I don't think we have made a case for that, because I think all we have focused on are the very things that the jury found and that the court convicted on. It would be a very bad precedent to suggest that it is somehow misbehavior to challenge a conviction because to challenge a conviction is to pursue your due process rights.

We certainly shouldn't be saying that there is anything wrong in doing that, even by a Federal judge, even though it may be embarrassing. He has those rights as we all do.

I think we can narrow this case and win this case and send the right message by narrowing it to eliminate Article IV, not because it isn't possible, but because it isn't prudent to pursue it.

Mr. **Edwards**. Would the gentleman yield to me and I ask that the gentleman from Connecticut have an additional minute?

The **Chairman**. The gentleman from Wisconsin controls the remaining time.

Mr. **Kastenmeier**. Mr. Chairman, I yield one more minute to the gentleman.

Mr. **Morrison**. I will be hapyy to yield to the gentleman from California.

The **Chairman**. The gentleman is recognized for one minute.

Mr. **Edwards**. Is the point, if we rely on the conviction and the gentleman from Connecticut makes a strong case on that, that if you open up other areas of misconduct, as obviously the count does, we will open up the entire case to all of the other issues, such as government misbehavior, FBI misbehavior, Joe Conforte and all of that. Is that accurate?

Mr. **Morrison**. I believe either Article IV stands for that possibility or stands for nothing at all.

The **Chairman**. The time of the gentleman has again expired.

The gentleman from California.

Mr. **Moorhead**. Thank you, Mr. Chairman.

I think, Mr. Chairman, that with Mr. DeWine's amendment to this article we have an article that provides a very important portion of our case.

I think if we forget the effect this conviction has had on the court, we make a very great mistake. The actual conviction of an income tax evasion in and of itself is one that many people regard in different ways, but the effect that it has on a judge who is going to have to sit in judgment on other people of society on this particular kind of case, and the courts that are going to hear this particular kind of case is devastating.

It would bring disrespect to the court if we didn't consider this kind of a conviction as something that is particularly bad for a judge.

I think we have to consider Article IV for that particular reason. If I may at this time, Mr. Chairman, I would like to yield to the gentleman from Ohio, Mr. Kindness, for three minutes.

The **Chairman**. The gentleman from Ohio is recognized for three minutes.

Mr. **Kindness**. Thank you, Mr. Chairman. I thank the gentleman. I too feel the amendment that will be offered by the gentleman from Ohio, Mr. DeWine, is essential to the clarification of Article IV, but that there really is nothing left of Article IV that we should include in the Articles of Impeachment once that amendment is adopted, and there will be a separate discussion of the content of the oath of office, which is different from our oath of office, as previously pointed out.

But I would like for you to just look at what would be left after taking out the paragraph, lines 13 to 17, on page 5, and the reference to the violation of the oath of office on line 1 on page 6.

After that, we are saying that Judge Claiborne has reduced confidence in the integrity and impartiality of the judiciary.

Could we seek to define it as a misdemeanor or misbehavior as would be charged here? Then how do you prove that Judge Claiborne has reduced confidence in the integrity and impartiality of the judiciary once he is removed from it as he is at present?

And then it goes on, "thereby bringing disrepute on the Federal Courts and the administration of justice by the courts," again. Is bringing disrepute on the Federal Courts a misdemeanor? And how do you prove it when most reasonable people could very well be said to consider only the person who misbehaves as being in disrepute and not the Federal Courts and the administration of justice by the courts?

When you look at what has to be done by way of proof in the trial in the Senate, Article IV is not very much to be putting forward. But the amount of effort required to put legitimate proof before the Senate of the elements, the remaining elements of Article IV after we remove the reference to oath of office, is entirely disproportionate and could change the focus of the impeachment trial in the Senate from that which is clear, concise and seems to me ought to be accomplished, to something else that is a sideshow.

A circus atmosphere could very well be injected into the circumstances of providing this kind of proof. It is a very different burden of proof that ought not to be placed upon those who manage the trial on the part of the House and the Senate, and I would urge that Article IV not be approved.

Mr. **MAZZOLI**. Mr. Chairman? Could I ask the permission of the gentleman from Wisconsin to speak?

The **CHAIRMAN**. The gentleman from Wisconsin controls the time.

Mr. **MAZZOLI**. I was just getting the gentleman's attention to see if he would yield to the gentleman from Kentucky two minutes.

Mr. **KASTENMEIER**. I will yield to the gentleman. Either the gentleman from Kentucky for two minutes or the gentleman from New Jersey.

I have committed time also to the gentleman from Kansas, so that in light of the amount of time already yielded, I don't know that that will be possible to now accommodate everybody's request.

Mr. **MAZZOLI**. Let me see if I can make it a minute, if it is possible.

Mr. **KASTENMEIER**. I yield the gentleman two minutes.

The **CHAIRMAN**. The gentleman from Kentucky is recognized for two minutes.

Mr. **MAZZOLI**. I thank my colleagues for the concerns. Let me quickly say, as I said earlier this morning, I think the Judge's behavior has been totally outrageous. I think it is scandalous to a very high degree.

It seems that the Judge, in his unwillingness to resign his charge and to leave the bench, despite his being in jail at this point, raises arrogance and contempt to an art form.

Having said that, I have to join with my friend from Connecticut, though somewhat unwillingly, because I hate not to have an article before us that deals with the conduct of a public official, but it does seem to me that this case is different than any other impeachment of a Federal Judge we have ever had in the history of this Republic because we have a conviction of a felonious charge.

All other impeachments have dealt with conduct which did not reach the point of conviction and sentence. In this case, it seems that we should rely upon those grounds as exclusively as we can, and I think Articles I and II and III do that very admirably.

I think the chairman had led us in a very closely focused effort in our mark-up and our hearing. I think we might make an error in going too far afield that might give a person like Judge Claiborne and his attorney the right to do a kind of clean-up job on the Federal Government, which is not before us, simply the conviction, simply his trial and his sentence. Therefore, despite my support for this article absent a conviction in a case like this, at this time, with a conviction I must, with again some sadness, support the gentleman's recommendation from Connecticut.

The **Chairman**. The gentleman from California.

Mr. **Moorhead**. Mr. Chairman, I recognize the gentleman from Wisconsin, Mr. Sensenbrenner.

The **Chairman**. The gentleman from Wisconsin is recognized for three minutes.

Mr. **Sensenbrenner**. Given the unanimous vote of approval of Articles I, II and III, it is obvious that the controversy over this fourth article is not an argument over substance, whether Judge Claiborne should be impeached, but a question of strategy over how we can take the strongest case to the Senate.

I support the inclusion of Article IV in the Resolution for several reasons.

First, since the beginning of the Republic, the House of Representatives has consistently taken the position that an impeachable offense is not just an indictable offense under the criminal law. Scandalous and outrageous conduct, which we all agree the Judge has engaged in, should be a separate impeachable offense because it does bring the Federal Judiciary into disrepute.

The process of impeachment as envisioned by the framers of our Constitution is a political decision rather than a judicial decision. That is because the framers of our Constitution did not provide for the automatic forfeiture of office upon conviction of a civil officer, and also limited the penalty for conviction upon an impeachment to removal from office, so an impeached and convicted civil officer cannot be fined or incarcerated or anything besides forfeiture from office and ineligibility to serve in public office again.

In the last impeachment case, that of Judge Ritter, tried in the Senate in 1936, the Senate specifically acquitted Judge Ritter of the charges in six of the articles that had been passed by the House of Representatives, naming specific offenses, but Judge Ritter was convicted of and removed from office on the seventh article which said that the combination of all of the behavior alleged in Articles I and VI, brought the Judiciary into scandalous disrepute.

I believe our case is strengthened by the inclusion of Article IV based upon this precedent. I do believe that the gentleman from Ohio, Mr. DeWine, has a constructive amendment.

And in conclusion, let me say that if we vote out a four-article bill of impeachment, there will be separate Senate votes on each of the three articles, and the vote in the Senate on Articles I and II would be a determination by the other body that the determination of the jury was enough to warrant removal from office, and the vote on Article III in the Senate would make a similar finding that conviction is enough to warrant removal from office.

We strengthen our case by also having a vote on the fourth article, the combination of all of what has been alleged does bring the courts into disrepute and Judge Claiborne should be removed for that reason, and that reason alone.

The **Chairman**. The gentleman from California.

Mr. **Moorhead**. I recognize the gentleman from Ohio for three minutes.

The **Chairman**. Mr. DeWine is recognized for three minutes.

Mr. DeWine. Mr. Chairman, I have an amendment at the desk.

The Chairman. The Clerk will report the amendment.

Mr. Cline. On page 5 of the committee print——

Mr. DeWine. I ask the amendment be considered as read.

The Chairman. Without objection, so ordered. The gentleman is recognized for three minutes.

[The amendment follows:]

### Amendment to Article IV of H. Res. 461, Offered by Mr. DeWine

On page 5 of the Committee Print, on line 13 strike the word "an" and insert in lieu thereof "the" and on line 14, strike ", by taking the oath," and on line 16 strike "enforce" and insert in lieu thereof "uphold" and on page 6, line 1, strike "violated his oath of office" and insert in lieu thereof the following: "betrayed the trust of the people of the United States."

Mr. DeWine. I would hope the members of the committee would support my amendment, and I think the intention is, Mr. Chairman, to tighten the language of this amendment. Clearly, the intent of the amendment is very clear to everyone, and that is that the Judge has violated the trust that the American people placed in him.

My problem with the draftmanship of the current amendment is really of a technical nature. I am bothered by, as I mentioned in the subcommittee, I am bothered by the specific reference to the oath of office. That sounds fine until you look at the oath of office, and the oath of office really relates to his administering justice to other people.

That seems to be the thrust of it, and we could argue that all day, and an argument could be made on the other side, that he clearly and directly violated the specific language of the oath of office.

We don't need to get into that, and to specifically reference it. My amendment deletes that specific reference to that oath of office and uses the language that was proposed by Mr. Mazzoli at the subcommittee.

Specifically, the following: That he has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the Judiciary, thereby bringing disrepute on the Federal Courts and the administration of justice by the courts.

I think that language, Mr. Chairman, complies with the thrust of what the subcommittee was trying to do, and also incorporates the thrust of what my friend from Kentucky was doing as well, so I would ask for adoption of the amendment.

It makes it easier to approve in the Senate, but still has the same intent.

Mr. Kastenmeier. Will the gentleman yield?

Speaking for myself, we have worked with the gentleman over the last two days on this language, and I am pleased to support his amendment.

Mr. DeWine. Thank you very much.

I would also mention, Mr. Chairman, that some of the specific language in here came from Chairman Rodino and some of the language also came from our subcommittee chairman, Mr. Kastenmeier, and we think it is a good amendment.

The **CHAIRMAN**. The gentleman from Wisconsin, Mr. Kastenmeier.

Mr. **KASTENMEIER**. I have two more requests, Mr. Chairman.

I would like to recognize the gentleman from Kansas, the gentleman—I guess from New Jersey, Mr. Hughes, for two minutes, and then the gentleman from Kansas afterwards.

Mr. **HUGHES**. I thank the gentleman for yielding, and I even hesitate to argue against Article IV, because I think that we could legitimately report out Article IV, find Article IV as a matter of fact, because there is no doubt in my mind that the Judge has in fact reduced the integrity of the Judiciary, that he has violated his oath of office, and the public trust, and that he has reduced the confidence, the integrity of the Federal Courts and the administration of justice.

The very fact that we are even arguing about it and taking this much time is proof of the pudding, that we are doing something that is not necessary.

I just fear that we are going to get off on this tangent in the Senate, and lose sight of the fact that here we have a judge that has been convicted by a jury on two counts of filing false income tax returns, and a judgment of conviction has been entered by a court, and it has gone through the appeal process, and in fact, that is sufficient in itself.

We need not find in Article IV an impeachable offense, just because under existing precedents we could, in fact, so find.

I realize that it is technical in nature, but I just think that we are perhaps going to be getting off on a tangent that will lose sight of where the focus should remain, and frankly, the facts are that we have two counts—two convictions on two counts, rather—and that should suffice, and for that reason, it would be my hope that we would not report out Article IV, although as I indicate, if it is reported out, it is something that I can support on the Floor and certainly could argue for.

It is a matter of strategy, not a matter of substance.

The **CHAIRMAN**. The time of the gentleman has expired.

The gentleman from California.

Mr. **MOORHEAD**. Mr. Chairman, I would like to ask unanimous consent to include in the record this statement.

The **CHAIRMAN**. Without objection, so ordered

[The statement of Mr. Moorhead follows:]

### STATEMENT OF HON. CARLOS J. MOORHEAD ON THE MEANING OF THE WORD "MISDEMEANOR"

Mr. Chairman, I would like to provide some discussion on the record of the use of the word "misdemeanor" as it's used in Article IV. As lawyers, when we use the word "misdemeanor" we do so as a way of distinguishing certain acts from being a felony—a misdemeanor is something less than a felony, in general a misdemeanor does not involve imprisonment in a penitentiary. 18 U.S.C. Sec. 1 defines an offense as a misdemeanor if the penalty does not exceed imprisonment for a period of six months or a fine of not more than $500 or both. But to lawyers a misdemeanor is an offense, found in title 18, with certain elements and a degree of proof, but I don't believe this is the meaning we should attribute to it as that word is used in Article II, Section 4.

The word misdemeanor is rooted in the word "demean" which refers to one's manner of conduct or behavior and in old English law comprehended all sorts of conduct that might rise to a violation of public trust.

"High Crimes and Misdemeanors" has traditionally been considered a "term of art" like such other constitutional phrases as "levying war" and "due process." The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the framers meant when they adopted them.

I don't believe that we should try and define what is meant by a "constitutional misdemeanor" but we should make clear in the report that it's something different than that found in 18 U.S.C. Section 1.

The **Chairman**. Other members may ask unanimous consent to insert their statements in the record, at the conclusion of the markup.

Mr. **Moorhead**. I yield five minutes to the gentleman from Colorado, Mr. Brown.

Mr. **Brown**. I thank the gentleman for the time. The area has been covered very well so far. We do face some interesting choices that do involve strategy, but one of the questions we face is, is there something more here other than simply a conviction?

As I read the statement of facts, there is.

There is here a particularly egregious, I think, pattern of conduct by the Judge, and it is accurately described in Article IV, and it involves simply more than filing an income tax return that is false.

In the language of Article IV, we are talking about willfully and knowingly filing false statements on income tax, which we have discussed before, as being a betrayal of his trust and in particular, reducing the confidence in the integrity and impartiality of the Judiciary.

That goes beyond simply filing a false income tax form. I appreciate the earlier points that say, perhaps, that is not essential to have it, but let me suggest, I think it would be a mistake to ignore this particular egregious conduct, and we are in danger of doing that.

To the point of whether or not there is something more here, let me suggest from page 2 of the memo, it points out he received, during 1980, 40-some-thousand-odd dollars, and he reported 22-some-odd thousands of that income.

On page 8, he had reported to two lending firms, mortgage companies, that he had received $45,000 in outside income. This gentleman is extraordinarily flexible in looking at what his income was for the year, reporting it low for income tax purposes, and high for borrowing money, but engaging in a pattern of particularly despicable conduct.

The prospect of a Federal Judge wandering around casinos in Nevada cashing checks, so they don't show up in his bank account, lends great reasons for inclusion of Article IV. It reduces the confidence, integrity and impartiality of the judiciary, and we would be remiss in not including it.

There is some concern by our colleagues, that I think is reasonable, that this might bring in other matters, but I don't see that it brings in any other matters that are not important for this body and the Senate to consider.

I don't see that it is an open door. Anything brought up in Article IV has to relate to what is Article IV, so I don't see that as a detrimental problem, and I would hope inasmuch as Article IV adds real meaning to the egregious activity of the Judge, I would hope we would not drop it.

I think it is a relevant consideration, that we would be remiss in not forwarding to the Senate for trial.

The CHAIRMAN. The time of the gentleman has expired.

Mr. KASTENMEIER. Mr. Chairman, I yield two minutes to the gentleman from Kansas, Mr. Glickman.

Mr. GLICKMAN. Thank you.

I was out of the room when the vote was taken on the first three articles; I would have voted in favor of all three articles. I would like to echo the comments of Mr. Brown, Mr. Sensenbrenner, Mr. Frank, when he was here, regarding some of the things concerning Article IV. We have a conviction, but the conviction confirms the underlying facts, and it is the facts that form the basis of the impeachment, not the conviction, and so therefore, Article IV, which is the clean-up article basically, is the article that deals with the facts of the case, and not the conviction.

That is why we are impeaching this judge, because of his wrongdoing. It was confirmed by a court of law, and a jury decided and a court took care of this guy and sent him to the penitentiary.

It was because of the facts in Article IV, in the event this conviction is ever set aside, if all you have is I, II and III, then the basis for the impeachment and/or conviction are down the tubes, and that is why we have to keep number IV, and particular for precedential value.

We may have other impeachment inquiries in the future where you don't have convictions.

The situation with Richard Nixon is the best example yet. This committee impeached him based upon conduct. Granted, a conviction provides you a reasonable basis to look at that conduct, but here, I think you can put both together quite satisfactorily, and in terms of how this affects operations——

Mr. MORRISON. Would the gentleman yield?

Mr. GLICKMAN. I am not finished yet.

If you take out IV, you take out the facts, and you leave yourself a lot more exposed somewhere down the line to deal with these convictions on a collateral basis.

We are impeaching this man for stealing basically from the public, and that ought to be the basis of this impeachment inquiry.

The CHAIRMAN. The time of the gentleman has expired.

The gentleman from Wisconsin has one minute remaining.

Mr. KASTENMEIER. I will not actually take the one minute other than to say I continue to believe that this is an essential part of the case.

I would hope, for reasons cited by others, that we will not only agree to the amendment of the gentleman from Ohio, but report favorably Article Number IV.

Mr. MORRISON. Would the gentleman yield for 30 seconds?

Mr. KASTENMEIER. I yield to the gentleman.

Mr. MORRISON. I think it is important to say the gentleman from Kansas said that the facts are not in the case except through Article IV, and if you read I and II carefully, they say the facts, and these facts have been found by the jury.

They are not based on the conviction, but based on the facts, and with all due respect to the gentleman's argument, the facts are in the case in Article I and II, and that has been the position of the chairman and of counsel.

I yield back.

The CHAIRMAN. All time for general debate has expired.

The question now occurs on the amendment of the gentleman from Ohio, Mr. DeWine. All those in favor of the amendment, please say aye.

All those opposed, please say no.

The ayes have it. The amendment is agreed to.

The question now occurs on the adoption of subcommittee amendment number five, as amended by Mr. DeWine.

Mr. MOORHEAD. I ask for a roll call vote.

The CHAIRMAN. A roll call vote is requested, and the roll will be called. Those in favor vote aye. Those opposed, no.

For those members who were not here and who were voted by proxy, the Chair would recognize them at the end of the roll call for such statements as they want to make regarding the vote that was cast by proxy, and how they might have voted had they been present.

The Clerk will call the roll.

Mr. CLINE. Mr. Brooks?

Mr. BROOKS. Aye.

Mr. CLINE. Mr. Kastenmeier?

Mr. KASTENMEIER. Aye.

Mr. CLINE. Mr. Edwards?

Mr. EDWARDS. Aye.

Mr. CLINE. Mr. Conyers?

Mr. KASTENMEIER. Aye, by proxy.

Mr. CLINE. Mr. Seiberling?

The CHAIRMAN. Aye, by proxy.

Mr. CLINE. Mr. Mazzoli?

Mr. MAZZOLI. No.

Mr. CLINE. Mr. Hughes?

Mr. HUGHES. No.

Mr. CLINE. Mr. Synar?

Mr. SYNAR. Aye.

Mr. CLINE. Mrs. Schroeder?

Mrs. SCHROEDER. Aye.

Mr. CLINE. Mr. Glickman?

Mr. GLICKMAN. Aye.

Mr. CLINE. Mr. Frank?

Mr. FRANK. Aye.

Mr. CLINE. Mr. Crockett?

Mr. CROCKETT. Aye.

Mr. CLINE. Mr. Schumer?

Mr. SCHUMER. Aye.

Mr. CLINE. Mr. Morrison?

Mr. MORRISON. No.

Mr. CLINE. Mr. Feighan?

Mr. FEIGHAN. Aye.

Mr. CLINE. Mr. Smith?

Mr. SMITH. No.

Mr. CLINE. Mr. Berman?

Mr. BERMAN. No.

Mr. CLINE. Mr. Boucher?

Mr. BOUCHER. Aye.

Mr. CLINE. Mr. Staggers?

The CHAIRMAN. Proxy, aye.

Mr. CLINE. Mr. Bryant?

Mr. BRYANT. Aye.

Mr. CLINE. Mr. Fish?

Mr. FISH. Aye.

Mr. CLINE. Mr. Moorhead?

Mr. MOORHEAD. Aye.

Mr. CLINE. Mr. Hyde?

Mr. MOORHEAD. Aye, by proxy.

Mr. CLINE. Mr. Kindness?

Mr. KINDNESS. No.

Mr. CLINE. Mr. Lungren?

Mr. LUNGREN. Aye.

Mr. CLINE. Mr. Sensenbrenner?

Mr. SENSENBRENNER. Aye.

Mr. CLINE. Mr. McCollum?

Mr. MOORHEAD. Aye, by proxy.

Mr. CLINE. Mr. Shaw?

Mr. MOORHEAD. Aye, by proxy.

Mr. CLINE. Mr. Gekas?

Mr. MOORHEAD. No, by proxy.

Mr. CLINE. Mr. DeWine?

Mr. DEWINE. Aye.

Mr. CLINE. Mr. Dannemeyer?

Mr. MOORHEAD. Aye, by proxy.

Mr. CLINE. Mr. Brown?

Mr. BROWN. Aye.

Mr. CLINE. Mr. Swindall?

Mr. SWINDALL. Aye.

Mr. CLINE. Mr. Coble?

Mr. COBLE. Aye.

Mr. CLINE. Mr. Rodino?

The CHAIRMAN. Aye.

The Clerk will report.

Mr. CLINE. Mr. Chairman, 28 members have voted aye; 7 members have voted no.

The CHAIRMAN. The amendment is agreed to.

The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I have a technical amendment at the desk.

The CHAIRMAN. The Clerk will report the technical amendment.

Mr. CLINE. Page 1, line 4, strike "and". Page 4, line 5, strike "the said". Page 4, line 18, strike "to."

The CHAIRMAN. Without objection, the amendment is considered as read. The gentleman is recognized.

Mr. MOORHEAD. The purpose is to clean up the terminology and has no effect other than that.

The CHAIRMAN. The question occurs on the amendment. All those in favor, please say aye.

All those opposed, no.

The ayes have it. The amendment is agreed to.

The question is on the resolution as amended. All those in favor vote aye.

All those opposed, no.

A roll call is requested. The Clerk will call the roll. Those in favor vote aye. Those opposed, no.

Mr. **Cline**. Mr. Brooks?

Mr. **Brooks**. Aye.

Mr. **Cline**. Mr. Kastenmeier?

Mr. **Kastenmeier**. Aye.

Mr. **Cline**. Mr. Edwards?

Mr. **Edwards**. Aye.

Mr. **Cline**. Mr. Conyers?

Mr. **Kastenmeier**. Votes aye, by proxy.

Mr. **Cline**. Mr. Seiberling?

The **Chairman**. Aye, by proxy.

Mr. **Cline**. Mr. Mazzoli?

[No response.]

Mr. **Cline**. Mr. Hughes?

Mr. **Hughes**. Aye.

Mr. **Cline**. Mr. Synar?

Mr. **Synar**. Aye.

Mr. **Cline**. Mrs. Schroeder?

Mrs. **Schroeder**. Aye.

Mr. **Cline**. Mr. Glickman?

Mr. **Glickman**. Aye.

Mr. **Cline**. Mr. Frank?

Mr. **Frank**. Aye.

Mr. **Cline**. Mr. Crockett?

Mr. **Crockett**. Aye.

Mr. **Cline**. Mr. Schumer?

Mr. **Schumer**. Aye.

Mr. **Cline**. Mr. Morrison?

Mr. **Morrison**. Aye.

Mr. **Cline**. Mr. Feighan?

Mr. **Feighan**. Aye.

Mr. **Cline**. Mr. Smith?

Mr. **Smith**. Aye.

Mr. **Cline**. Mr. Berman?

Mr. **Berman**. Aye.

Mr. **Cline**. Mr. Boucher?

Mr. **Boucher**. Aye.

Mr. **Cline**. Mr. Staggers?

The **Chairman**. Proxy, aye.

Mr. **Cline**. Mr. Bryant?

Mr. **Bryant**. Aye.

Mr. **Cline**. Mr. Fish?

Mr. **Fish**. Aye.

Mr. **Cline**. Mr. Moorehead?

Mr. **Moorehead**. Aye.

Mr. **Cline**. Mr. Hyde?

Mr. **Moorehead**. Aye, by proxy.

Mr. **Cline**. Mr. Kindness?

Mr. **Kindness**. Aye.

Mr. **Cline**. Mr. Lungren?

Mr. **Lungren**. Aye.

Mr. **Cline**. Mr. Sensenbrenner?

Mr. **Sensenbrenner**. Aye.

Mr. **Cline**. Mr. McCollum?

Mr. **Moorehead**. Aye, by proxy.

Mr. **Cline**. Mr. Shaw?

Mr. **Moorehead**. Aye, by proxy.

Mr. **Cline**. Mr. Gekas?

Mr. **Moorehead**. Aye, by proxy.

Mr. **Cline**. Mr. DeWine?

Mr. **DeWine**. Aye.

Mr. **Cline**. Mr. Dannemeyer?

Mr. **Moorehead**. Aye, by proxy.

Mr. **Cline**. Mr. Brown?

Mr. **Brown**. Aye.

Mr. **Cline**. Mr. Swindall?

Mr. **Swindall**. Aye.

Mr. **Cline**. Mr. Coble?

Mr. **Coble**. Aye.

Mr. **Cline**. Mr. Rodino?

The **Chairman**. Aye.

The Clerk will report.

Mr. **Cline**. Mr. Chairman, 35 members have voted aye. There were no negative votes.

The **Chairman**. The resolution is agreed to.

The gentleman from Wisconsin.

Mr. **Kastenmeier**. Mr. Chairman, I ask unanimous consent that the resolution be reported as a single amendment in the nature of a substitute incorporating all amendments approved here today.

The **Chairman**. Without objection, it is so ordered.

Mr. **Kastenmeier**. Mr. Chairman, I wish to thank you and all members of the committee for participating in this process today. It is an excellent one.

The **Chairman**. The gentleman from Florida, Mr. Smith.

Mr. **Smith**. Mr. Chairman, I was out of the room when the vote was taken on the first three articles, and was voted aye, by proxy. I wish to be voted aye, in person.

The **Chairman**. His statement will be recorded.

Mr. **Smith**. Thank you.

The **Chairman**. Any others?

Mr. **Brown**. Mr. Chairman, I want to express my thanks for your invitation to clear the record. My proxy was voted aye on the first two articles. That accurately reflects my feelings.

If I had not been detained by other legislative business and been here in person, I would have certainly voted in person as I was recorded aye, by proxy, on both of those articles.

The **Chairman**. The Committee on the Judiciary has reflected great credit upon itself. I would like to commend the gentleman from Wisconsin, Mr. Kastenmeier, the chairman of the subcommittee, as well as the ranking minority member, Mr. Moorehead, for their work. I consider this to be, although a regrettable event in the history of our country, a historic proceeding nonetheless. As I stated in my opening statement, there has never been a proceeding such as this wherein a judge was actually convicted before being considered for impeachment. I think the Committee on the Judiciary has conducted itself in an admirable manner, and I think that the precedent that will be set here will be one that will be followed.

I look forward to presenting this matter on the Floor as soon as we possibly can. The committee will be advised after the Chair has consulted with the chairman of the subcommittee and the ranking minority member.

Mr. KASTENMEIER. Mr. Chairman? This concludes this proceeding, but I wish to advise members of my subcommittee, we are meeting in 15 minutes on a mark-up in 2226.

Thank you, Mr. Chairman.

The CHAIRMAN. The committee stands adjourned.

[Whereupon, at 12 noon, the committee was adjourned.]